

# The Unified Agenda: Proposals for Reform

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This draft report was prepared for the consideration of the Administrative Conference of the United States. The views expressed are those of the author and do not necessarily reflect those of the members of the Conference or its committees.

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# I. Executive Summary

The Unified Agenda of Federal Regulatory and Deregulatory Actions is published (usually twice each year) by the Regulatory Information Service Center (RISC, a division of the General Services Administration) for the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget, and is intended to provide the public and other users with government-wide information about upcoming agency rules. For example, “proposed rule stage” and “final rule stage” entries in the agenda identify proposed and final rules that the agencies expect to issue within the next 12 months. Although agencies are not required to issue rules that are listed in the agenda, and rules may be published without having been previously listed, the agenda is widely used to predict federal rulemaking activity, and helps agencies satisfy requirements in both the Regulatory Flexibility Act and Executive Order 12866.

This report indicates that a number of “significant” rules (primarily final rules issued by Cabinet departments and independent agencies, and proposed and final rules issued by certain independent regulatory agencies) were published in the first half of 2014 without the Unified Agenda indicating that they were about to be issued.<sup>1</sup> Also, almost half of the “economically significant” proposed and final rules that were predicted by the Spring 2013 edition of the agenda (e.g., those expected to have a \$100 million impact on the economy) were not published during the following 16 months. In fact, many entries have appeared at the same stage of the agenda for years without any rulemaking action. Also, the Unified Agenda sometimes did not provide accurate information about the nature of agencies’ significant rules (e.g., indicating that a forthcoming rule was not significant when the published rule indicated that it was significant). It is understandable why some rules were issued without a prior agenda entry, why such entries did not lead to proposed and final rules, and why agenda entries were sometimes incorrect. However, in other cases it was not clear why these results occurred. Most notably, the Federal Communications Commission (FCC) does not use the agenda to identify forthcoming proposed or final rules, instead putting virtually all of the agency’s ongoing activity into a general “long-term action” category.

The total number of entries in the Unified Agenda declined in 2013 and 2014, perhaps because some entries have been kept in an undisclosed “pending” category that allows agencies to keep regulation identifier numbers and titles active while not publishing the entries in the agenda. Although some federal agencies reportedly update their agenda entries in the RISC database between the twice-yearly agenda publications, that information only becomes available to the public when the agenda is published twice a year. Two related databases that RISC maintains are updated daily, and some agencies maintain their own information systems and websites that provide more up-to-date rulemaking information than is available through the agenda.

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<sup>1</sup> As discussed later in this report, certain rules issued by independent regulatory agencies were considered “significant” even though they were not covered by Executive Order 12866 and were not reviewed by OIRA.

The report recommends that OIRA determine whether the Unified Agenda should become a “real-time” database of agency rulemaking actions. If OIRA concludes that a real-time agenda is not justified for all rules, the report recommends that it take other steps to ensure that the public has access to more up-to-date information on agencies’ ongoing and completed actions. The report also recommends that (1) OIRA establish electronic checks to reduce inconsistencies in the agenda information, and clarify the agenda’s Regulatory Flexibility Act data elements, (2) the FCC identify forthcoming proposed and final rules in the agenda, and (3) rulemaking agencies move “pending” rules that are under development back into the published agenda, move entries that have been at the same stage of the agenda for years into the “long-term action” stage or eliminate them from the agenda entirely, and move agenda entries into the “completed action” stage when they decide to discontinue rulemaking actions.

## II. Introduction

For more than 35 years, federal regulatory agencies have been required to notify the public about their upcoming rules.<sup>2</sup> Currently, Section 602 of the Regulatory Flexibility Act (RFA, 5 U.S.C. § 602) requires that covered agencies (Cabinet departments, independent agencies, and independent regulatory agencies)<sup>3</sup> publish “regulatory flexibility agendas” in the *Federal Register* each April and October describing regulatory actions they are developing that are likely to have a “significant economic impact on a substantial number of small entities.”<sup>4</sup> Also, Section 4(b) of Executive Order (EO) 12866 requires the same agencies to “prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator” of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB).<sup>5</sup> All agencies reportedly use the Unified Agenda of Federal Regulatory

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<sup>2</sup> One of the first such requirements was in Section 2 of Executive Order 12044, “Improving Government Regulations,” 43 *Federal Register* 12661, March 24, 1978. See Appendix A of this report for a more detailed discussion and comparison of statutory and executive order agenda requirements.

<sup>3</sup> As used in this report, the term “independent regulatory agencies” refers to agencies established to be independent of the President, including the Federal Communications Commission and the Securities and Exchange Commission. The term “independent agencies” refers to agencies that are independent of Cabinet departments but are not independent regulatory agencies (e.g., the Environmental Protection Agency).

<sup>4</sup> Specifically, Section 602 of the RFA requires the regulatory flexibility agendas to contain (1) a brief description of the subject area of any upcoming rule likely to have such an impact; (2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda, the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking, and (3) the name and telephone number of a knowledgeable agency official. As discussed in Appendix A of this report, relatively few rules are determined to have a “significant economic impact on a substantial number of small entities,” so relatively few rules are actually covered by this agenda requirement.

<sup>5</sup> Executive Order 12866, “Regulatory Planning and Review,” 58 *Federal Register* 51735, October 4, 1993. For a copy of this executive order, see <http://www.whitehouse.gov/omb/inforeg/eo12866.pdf>. OIRA was created within OMB by Section 3503 of the Paperwork Reduction Act (PRA) of 1980 (44 U.S.C. Chapter 35). Pursuant to other requirements in Executive Order 12866, OIRA reviews hundreds of significant proposed and final rules before they are published in the *Federal Register*. Most of the executive order’s requirements do not apply to independent regulatory agencies, but the agenda requirements in Section 4(b) do apply to those agencies.

and Deregulatory Actions (hereafter, “Unified Agenda” or “agenda”) to satisfy both of these requirements.<sup>6</sup>

Since 1983, the Regulatory Information Service Center (RISC), located within the General Services Administration (GSA), has compiled the Unified Agenda for OIRA.<sup>7</sup> Usually published twice each year,<sup>8</sup> the agenda provides data in a standardized format on regulatory and deregulatory activities under development by about 60 executive departments, agencies, and commissions. The “active” entries in the agenda are, in general, activities that will have a regulatory action within the next 12 months.<sup>9</sup> For example, a “proposed rule stage” agenda entry indicates that the agency expects to issue a proposed rule (or close a proposed rule comment period) within the next 12 months; a “final rule stage” entry indicates that the agency expects to publish a final rule or take other final action within the next 12 months. The agenda has been available online since 1995, and has been available exclusively online since 2007.<sup>10</sup>

## A. Support for and Use of the Unified Agenda

A variety of individuals and organizations have voiced support for the Unified Agenda and/or have used the agenda to identify upcoming rules overall or within particular policy areas.

- The American Bar Association’s Section of Administrative Law and Regulatory Practice said the agenda is “an integral part of the Federal regulatory process,” and said it “provides important information to agency heads, centralized reviewers, and the public at large, thereby serving the values of open government.”<sup>11</sup>

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<sup>6</sup> Regulatory Information Service Center, “Introduction to the Unified Agenda of Federal Regulatory and Deregulatory Actions,” May 23, 2014, available at [http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201404/Preamble\\_8888.html](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201404/Preamble_8888.html), which states in part that “All Federal regulatory agencies have chosen to publish their regulatory agendas as part of the Unified Agenda.” The agenda generally does not include rules concerning military or foreign affairs functions, or rules that only concern matters related to agency organization, management, or personnel.

<sup>7</sup> RISC was created in June 1981. According to the Unified Agenda website (see <http://www.reginfo.gov/public/do/eAgendaMain>), RISC “undertakes projects that will facilitate development of and access to information about Federal regulatory and deregulatory activities. It accomplishes this by gathering and publishing information on Federal regulations and their effects on society. The Center provides this information to the President, Congress, agency officials, and the general public to help them better understand and manage the regulatory process. The Center’s principal publication is the Unified Agenda.”

<sup>8</sup> As noted later in this report, only one edition of the Unified Agenda was published in 2012.

<sup>9</sup> “Active” entries in the agenda include “prerule stage” actions, “proposed rule stage” actions, and “final rule stage actions.” The agenda also includes “completed” actions and “long-term” actions. Fall editions of the Unified Agenda include the Regulatory Plan, which presents agency statements of regulatory priorities and additional information about the most significant regulatory activities planned for the coming year.

<sup>10</sup> The only agenda items that are published in the *Federal Register* are those that are expected to have a significant economic impact on a substantial number of small entities and entries that have been selected for review under Section 610 of the Regulatory Flexibility Act.

<sup>11</sup> Letter from James W. Conrad, Jr., Section Chair, to Boris Bershteyn, Acting Administrator of OIRA, “Re: Spring and Fall 2012 Unified Regulatory Agenda,” November 30, 2012, available at [http://www.americanbar.org/content/dam/aba/administrative/administrative\\_law/unified\\_regulatory\\_agendas\\_letter.aut](http://www.americanbar.org/content/dam/aba/administrative/administrative_law/unified_regulatory_agendas_letter.aut)

- The Administrative Law Review's *A Citizen's Guide to Influencing Agency Action* describes the agenda as a "way to see if an issue you are concerned about is likely to be addressed through rulemaking in the near future."<sup>12</sup>
- A Heritage Foundation issue brief described the agenda as "an essential tool of government transparency and accountability," and said it "enables citizens to participate in the rulemaking process, businesses to plan, and Congress to engage in oversight."<sup>13</sup>
- A 2012 study published in the *Journal of Public Administration Research and Theory* characterized the agenda as "the foremost mechanism used by the federal government to signal future regulatory plans to public and private stakeholders."<sup>14</sup>
- The Regulatory Studies Center at George Washington University said the agenda "provides the public with a first glimpse at upcoming regulations and, in a perfect world, offers citizens the chance to become involved in the rulemaking process before agencies make major decisions final."<sup>15</sup>

Recent users of the Unified Agenda include:

- The Congressional Research Service (CRS) within the Library of Congress, which has used the agenda to identify upcoming rules under the Patient Protection and Affordable Care Act<sup>16</sup> and the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>17</sup>
- The Associated General Contractors of America, which uses the agenda to identify upcoming Environmental Protection Agency (EPA) rules of interest to the contracting industry.<sup>18</sup>

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hcheckdam.pdf.

<sup>12</sup> See <http://www.administrativelawreview.org/publicresources/CitizensGuide.pdf>, p. 10.

<sup>13</sup> Diane Katz, "Obama's Regulatory Agenda: Calm Before the Superstorm," Heritage Foundation Issue Brief #3764, October 31, 2012, available at <http://www.heritage.org/research/reports/2012/10/obama-s-agenda-of-federal-regulations-calm-before-the-superstorm>.

<sup>14</sup> Stephane Lavertu and Susan Webb Yackee, "Regulatory Delay and Rulemaking Deadlines," *Journal of Public Administration Research and Theory*, vol. 24 (2012), pp. 185-207, at 191. The agenda has also served as the basis of empirical studies of rulemaking activity. See, for example, Anne Joseph O'Connell, "Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State," *Virginia Law Review*, vol. 94 (2008), pp. 889-986.

<sup>15</sup> Sofie E. Miller, Regulatory Studies Center, The George Washington University, "What's New in the Fall 2014 Regulatory Agenda?," available at <http://regulatorystudies.columbian.gwu.edu/whats-new-fall-2014-regulatory-agenda>.

<sup>16</sup> CRS Report R43622, *Upcoming Rules Pursuant to the Patient Protection and Affordable Care Act: The Spring 2014 Unified Agenda*, by Maeve P. Carey, available at <http://fas.org/sgp/crs/misc/R43622.pdf>.

<sup>17</sup> CRS Report R41958, *Upcoming Rules Pursuant to the Dodd-Frank Act: Spring 2011 Unified Agenda*, by Curtis W. Copeland and Maeve P. Carey, available at <https://www.hsdl.org/?view&did=718754>.

<sup>18</sup> See <http://news.agc.org/2014/02/28/epa-agenda-includes-stormwater-fly-ash-and-lead-paint-regulations/>

- Financial industry publications, which have used the agenda to identify upcoming rules from the Securities and Exchange Commission (SEC) and other financial agencies.<sup>19</sup>
- Consulting firms, which use the agenda to identify rules that are expected to be issued by the Occupational Safety and Health Administration (OSHA) and other agencies.<sup>20</sup>
- Cultural Heritage Partners, PLLC, which uses the agenda to identify upcoming rules with potential impacts on cultural resources.<sup>21</sup>
- The Competitive Enterprise Institute (CEI), which uses the agenda to report on the number of rules expected to be issued government-wide.<sup>22</sup>

Even the *Federal Register* relies on the Unified Agenda to identify the priority level of published rules in its search mechanism.<sup>23</sup>

Members of Congress have also used the agenda to highlight upcoming rules,<sup>24</sup> and some have envisioned it as a way to reform the federal rulemaking process. For example, in the 113<sup>th</sup> Congress, H.R. 2804, the Achieving Less Excess in Regulation and Requiring Transparency (ALERRT) Act of 2014, would have required federal agencies to submit information for a monthly supplement to the Unified Agenda. OIRA would have been required to post that information on the Internet on a monthly and annual basis. With certain exceptions, regulations would not have been effective until six months after they have appeared in the proposed monthly report.<sup>25</sup> The House of Representatives passed the ALERRT Act on February 27, 2014, but the Senate did not act on the legislation.

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<sup>19</sup> Joe Mont, “SEC to Issue Revised ‘Extraction Payments’ Rule in 2015,” *Compliance Week*, May 27, 2014, available at <http://www.complianceweek.com/blogs/the-filing-cabinet/sec-looks-to-issue-revised-extraction-payments-rule-in-2015#.U-EpXShMbao>.

<sup>20</sup> See, for example, J.J. Keller & Associates, Inc., “29 rulemakings listed on OSHA’s Spring Unified Agenda,” May 30, 2014, available at [http://www.jjkeller.com/shop/Category/content\\_category\\_Workplace%20Safety\\_article\\_29-rulemakings-listed-on-OSHAs-Spring-Unified-Agenda\\*052014\\_10151\\_-1\\_10551](http://www.jjkeller.com/shop/Category/content_category_Workplace%20Safety_article_29-rulemakings-listed-on-OSHAs-Spring-Unified-Agenda*052014_10151_-1_10551). See also Fred Hosier, “What’s on OSHA’s regulatory agenda for 2014,” at <http://www.safetynewsalert.com/whats-on-oshas-regulatory-agenda-for-2014/>.

<sup>21</sup> See <http://www.culturalheritagepartners.com/the-administrations-unified-agenda-potential-impacts-on-cultural-resources/>.

<sup>22</sup> Wayne Crews, “Obama’s New Unified Agenda of Federal Regulations Shows Big Rules Are Growing,” available at <http://cei.org/2014/05/29/obamas-new-unified-agenda-of-federal-regulations-shows-big-rules-are-growing>. See also, Wayne Crews, “Big Sexy Holiday Fun With the Unified Agenda,” *Forbes*, December 2, 2013, available at <http://www.forbes.com/sites/waynecrews/2013/12/02/big-sexy-holiday-fun-with-the-unified-agenda-of-federal-regulations/>. The media often picks up those CEI reports. See Shannon Bream, “Regulation Nation: Gov’t regs estimated to pound private sector with \$1.8T in costs,” FoxNews, December 6, 2013, available at <http://www.foxnews.com/politics/2013/12/06/regulation-nation-govt-regs-estimated-to-cost-18t/>.

<sup>23</sup> For example, when searching for rules published during a particular period of time that are considered “significant” under Executive Order 12866, the *Federal Register* search engine uses the priority characterization that appeared in the Unified Agenda.

<sup>24</sup> See “Vitter: Administration Hides Regulatory Onslaught in the Days Before Thanksgiving,” December 4, 2013, at [http://www.epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=bf05edb4-0e92-2336-7c63-a0e7d7574893](http://www.epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=bf05edb4-0e92-2336-7c63-a0e7d7574893).

<sup>25</sup> For a cost estimate, see <http://www.cbo.gov/sites/default/files/cbofiles/attachments/hr2804.pdf>.

## B. ACUS and the Unified Agenda

The Administrative Conference of the United States (ACUS) has also voiced support for the Unified Agenda as a tool for regulatory planning, and has recommended its use in certain contexts. For example, in a December 1993 recommendation, ACUS said the “President's policy should encourage planning and coordination of regulatory initiatives, and early dialogue between agencies and the reviewing entity. To this end, the concept of a unified agenda of regulations is a useful tool and should be preserved.”<sup>26</sup> ACUS has also recommended that agencies “provide information in the Unified Agenda of Federal Regulatory and Deregulatory Actions regarding their plans with respect to rules that are remanded without vacatur.”<sup>27</sup>

Reports prepared for ACUS (although not the Administrative Conference itself) have recommended that “agency notifications regarding rulemakings should be tied to inclusion in the Unified Regulatory Agenda; the addition or change of any item in the Unified Regulatory Agenda should trigger notification via social media.”<sup>28</sup> The Unified Agenda has also been identified during ACUS committee meetings as a means by which state governments can better understand forthcoming regulations that may involve federalism or preemption concerns.<sup>29</sup>

## C. Concerns About the Unified Agenda

These various uses and expressions of support notwithstanding, it is unclear how well the Unified Agenda actually informs the public or other users about upcoming regulatory actions. For example, it is unclear how often the proposed and final rules that agencies issue are preceded by “proposed rule stage” and “final rule stage” entries in the agenda, or how often proposed and final rules are actually issued within the 12 months following the publication of such entries. It is also unclear whether the descriptive information in those entries is accurate (e.g., whether upcoming regulatory actions described in the agenda as “major” under the Congressional Review Act (5 U.S.C. § 801, Pub. L. 104-121) really are “major” rules when they are ultimately issued).

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<sup>26</sup> Administrative Conference of the United States, “Improving the Environment for Agency Rulemaking,” Recommendation 93-4, December 9, 1993, p. 2, available at <http://www.acus.gov/sites/default/files/documents/93-4.pdf>.

<sup>27</sup> Administrative Conference of the United States, Recommendation 2013-6, Adopted December 5, 2013, available at [http://www.acus.gov/sites/default/files/documents/Remand%20Without%20Vacatur%20\\_%20Final%20Recommendation.pdf](http://www.acus.gov/sites/default/files/documents/Remand%20Without%20Vacatur%20_%20Final%20Recommendation.pdf).

<sup>28</sup> Michael Herz, *Using Social Media in Rulemaking: Possibilities and Barriers*, November 21, 2013, p. 33, available at <http://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf>.

<sup>29</sup> Administrative Conference of the United States, Committee on Regulation, Minutes, October 19, 2010, p. 7, available at <http://www.acus.gov/sites/default/files/documents/RevisedFinalOct19MeetingMinutes.pdf>.

Both the RFA and the Unified Agenda itself clearly state that the agenda may not always predict subsequent rulemaking. Section 602 of the RFA states that “Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory flexibility agenda, or requires an agency to consider or act on any matter listed in such agenda.”<sup>30</sup> Also, the preamble to the Unified Agenda states:

Agencies may withdraw some of the regulations now under development, and they may issue or propose other regulations not included in their agendas. Agency actions in the rulemaking process may occur before or after the dates they have listed. The Unified Agenda does not create a legal obligation on agencies to adhere to schedules in this publication or to confine their regulatory activities to those regulations that appear within it.

In August 2011, OIRA responded to concerns expressed by the Speaker of the House of Representatives about the number of rules that the Unified Agenda indicated could be issued within the next year.<sup>31</sup> The OIRA administrator said the agenda is “simply a list of potential ideas that agencies may consider pursuing,” and went on to characterize it as “merely a list of rules that are under general contemplation, provided to the public in order to promote transparency.”<sup>32</sup>

These caveats notwithstanding, concerns have been expressed about the accuracy and the predictive capacity of the agenda. For example, in a 1994 article in the *Maryland Law Review*, Steven J. Groseclose concluded that EPA had published “consistently inaccurate dates in the guise of reliable estimates” in the Unified Agenda, which resulted in “a veil of deception over the rulemaking process that not only impairs public and private participation, but creates needless public mistrust of the regulatory system.”<sup>33</sup>

In July 2001, GAO sent a letter to the Executive Director of RISC noting several errors in recent editions of the Unified Agenda.<sup>34</sup> For example, GAO said some entries reported the wrong date of regulatory action, and other entries incorrectly reported the status of rules regarding the Regulatory Flexibility Act (e.g., entries indicating that a rule required a regulatory flexibility analysis, but the rule itself indicated that an analysis was not required). GAO recommended that RISC alert the agencies that some of their entries were in error, and that they should take steps to ensure that future editions of the agenda were more accurate.

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<sup>30</sup> 5 U.S.C. § 602(d).

<sup>31</sup> The Speaker of the House of Representatives criticized the Obama Administration for issuing too many costly regulations, and for having more than 4,200 new regulations “in the pipeline.” See, for example, “Business Roundtable Chair Says Tsunami of New Regulations Hurting Job Growth,” at <http://boehner.house.gov/business-roundtable-chair-says-tsunami-of-newregulations-hurting-job-growth/>. The Spring 2011 Unified Agenda contained about 4,200 entries, but that total included hundreds of “completed actions.” See also Letter to President Barack Obama from Speaker John Boehner, August 26, 2011, available at <http://www.speaker.gov/press-release/citing-spike-red-tape-speaker-boehner-seeks-info-white-house-job-threatening>.

<sup>32</sup> Cass Sunstein, “The Facts About Regulations, August 26, 2011, available at <http://www.whitehouse.gov/blog/2011/08/26/facts-about-regulations>.

<sup>33</sup> Steven J. Groseclose, “Reinventing the Regulatory Agenda: Conclusions from an Empirical Study of EPA’s Clean Air Act Rulemaking Progress Projections,” *Maryland Law Review*, vol. 53 (1994), pp. 521-576, at 522. Nevertheless, the author concluded (p. 523) that the agenda “could be transformed from a semi-annual bureaucratic ritual into a beneficial measurement tool.”

<sup>34</sup> U.S. General Accounting Office, *Accuracy of Information in the Unified Agenda*, GAO-01-1024R, July 27, 2001, available at <http://www.gao.gov/assets/90/82893.pdf>.

In July 2009, the Congressional Research Service reported that about one-quarter of the 231 proposed rules published during calendar year 2008 that had been reviewed by OIRA under EO 12866 were not preceded by any “proposed rule stage” Unified Agenda entries.<sup>35</sup> Even when there was a preceding agenda entry, some of those entries were published only a few days before the rule was published. CRS also found that federal departments and agencies differed in the extent to which they used the agenda. Some agencies (e.g., the Department of Health and Human Services (HHS) and EPA) published related “proposed rule stage” entries in the agenda before publishing 90% of their proposed rules, while other agencies (e.g., the Department of Defense (DOD) and the Office of Personnel Management (OPM)) published more than half of their NPRMs without such entries.

During a September 2013 congressional hearing, former OIRA administrator Sally Katzen testified that the Unified Agenda “is the one systematic government-wide report of contemplated (and completed) regulatory actions,” and said that “it is used both by those inside the government and by stakeholders potentially affected by the regulations — be they regulated entities or regulatory beneficiaries — to monitor what is happening at the various regulatory agencies.”<sup>36</sup> However, she went on to say the following:

But the document is only as valuable as the information is accurate. Regrettably, over the years, a number of regulatory proposals were included in the Agenda because someone at an agency thought it was possible that action on that proposal might occur within a few years; then, once entered into the Agenda, the entry takes on a life of its own even if there is virtually no likelihood of any activity on the proposal in the foreseeable future. The information then becomes misinformation or obscures what is truly relevant.<sup>37</sup>

As a consequence, Ms. Katzen said, “the process of submitting entries to the Agenda has become more of a paper exercise than an analytical tool.”<sup>38</sup>

Others have also expressed concerns about the quality of the information in the Unified Agenda. For example, Leland Beck, the author of the *Federal Regulations Advisor*, described the agenda as “only a ‘snapshot’ of intentions,” noting that “foreseen and unforeseen events can change an agency’s priorities quickly and frequently.”<sup>39</sup> He also said “the agency agendas reflect what the agency wants to make public, not necessarily all that they are actually considering, and some highly controversial issues may be withheld.” Also, in his October 2014 “Guide to Writing Public Interest Comments Using Economic Analysis,” Jerry Ellig of the Mercatus Center at George Mason University said

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<sup>35</sup> CRS Report R40713, *The Unified Agenda: Implications for Rulemaking Transparency and Participation*, by Curtis W. Copeland, July 20, 2009.

<sup>36</sup> Sally Katzen, testimony before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, House Committee on the Judiciary, September 30, 2013, p. 5, available at [http://judiciary.house.gov/\\_files/hearings/113th/09302013/Katzen%20Testimony.pdf](http://judiciary.house.gov/_files/hearings/113th/09302013/Katzen%20Testimony.pdf).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Leland Beck, “Fall 2013 Unified Agenda Published: Something New, Something Old,” *Federal Regulations Advisor*, November 27, 2013, available at <http://www.fedregsadvisor.com/2013/11/27/fall-2013-unified-agenda-published-something-new-something-old/>.

“regulations can remain listed in the Unified Agenda for years before they are proposed, and sometimes regulations are proposed that were never listed in this document.”<sup>40</sup>

Still other concerns have been raised about how the agenda information is used. For example, James Goodwin of the Center for Progressive Reform noted that some have cited the total number of entries in the agenda as evidence that the Obama Administration was about to issue a “tsunami” of regulations.<sup>41</sup> However, he said such complaints were “groundless” because many agenda entries are carried over from one edition to the next.<sup>42</sup> In fact, he said, the agenda “has become more of a litany of the latest delays of and extensions to expected timelines for issuing proposals or final rules.”

There have also been a number of suggestions for improving the operation of the Unified Agenda. For example, in the above-mentioned CRS report, one of the policy options that the Service recommended was for Congress or the President to require agencies to publish a “proposed rule stage” entry in the Unified Agenda before publishing a notice of proposed rulemaking (NPRM), or to explain why such an entry was not possible.<sup>43</sup> Another option was that the agenda be published more frequently (e.g., quarterly instead of semi-annually), or to maintain the agenda as an ongoing, “real-time” database.

Similarly, in an October 2013 report for ACUS, Michael Herz of the Benjamin N. Cardozo School of Law noted that the agenda had been posted to the Internet rather than distributed in printed form since 2007, and as a result “the justification for only updating the Agenda twice a year largely evaporates. The Agenda would be more valuable, timely, and useful if it was kept ‘ever green,’ updated by each agency as soon as it decides to proceed with a relevant action.”<sup>44</sup>

## D. Objectives, Scope, and Methodology

The primary objectives of this report are to examine:

- The extent to which “significant” proposed and final rules that were published during the first six months of 2014 were preceded by a “proposed rule stage” or “final rule stage” notice in the previous edition of the Unified

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<sup>40</sup> See <http://mercatus.org/publication/guide-writing-public-interest-comments-using-economic-analysis>.

<sup>41</sup> James Goodwin, Center for Progressive Reform, “By the Numbers: The Costs of New Regulatory Delays Announced in the Spring 2013 Regulatory Agenda,” July 9, 2013, available at <http://www.progressivereform.org/CPRBlog.cfm?idBlog=C3C57EBD-EF7E-C097-22F325934095F78F>.

<sup>42</sup> Also, as discussed later in this report, hundreds of the entries in each edition of the agenda are for “completed actions,” which are rules that have already been published and rules that have been discontinued or otherwise completed.

<sup>43</sup> CRS Report R40713, op. cit., pp. 17-18.

<sup>44</sup> Michael Herz, *Using Social Media in Rulemaking: Possibilities and Barriers*, November 21, 2013, p. 33, available at <http://www.acus.gov/sites/default/files/documents/Herz%20Social%20Media%20Final%20Report.pdf>. Among other things, the report recommended that “agency notifications regarding rulemakings should be tied to inclusion in the Unified Regulatory Agenda; the addition or change of any item in the Unified Regulatory Agenda should trigger notification via social media.”

Agenda. If no notice of the rule was published in the preceding Unified Agenda, determine why this occurred.

- The extent to which “economically significant” or “major” “proposed rule stage” and “final rule stage” notices in a recent agenda were followed up by a published proposed or final rule within the succeeding 12 months (or longer). If no proposed or final rule is subsequently published, determine why this occurred.
- The accuracy of the information in the agenda regarding subsequently published significant proposed and final rules (e.g., whether the agenda was correct regarding when the rules would be issued, whether the rules were accurately identified in the agenda as “significant” or “economically significant” rules, and whether the agenda accurately identified the need for analysis under the Regulatory Flexibility Act). If agenda entries are not accurate, determine why this occurred.
- Whether there are ways that the Unified Agenda could be improved to provide more timely and predictive information to the public about forthcoming significant rules. For example, determine whether it is possible to have a Unified Agenda that is constantly updated (instead of being issued only twice each year), providing more “real-time” information about agencies’ forthcoming rules. Identify the advantages and disadvantages of this and other possible changes.

## 1. Definitions

Section 3(e) of Executive Order 12866 defines a “regulatory action” as “any substantive action by an agency (normally published in the *Federal Register*) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.”<sup>45</sup>

Section 3(f) of the executive order defines a “significant” regulatory action as one that satisfies any of four conditions:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.

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<sup>45</sup> Because nearly 90% of all regulatory actions are draft proposed or final rules, this report sometimes uses “rules” as a shortened version of “regulatory actions.”

Rules fitting the first of these conditions are often referred to as “economically significant” regulatory actions.

Section 804(2) of the Congressional Review Act defines a “major” rule as

any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.

The definitions of “major” and “economically significant” rules are similar, and virtually all “economically significant” rules are also considered “major.” However, OMB has indicated that some rules may be considered “major” that are not “economically significant” (e.g., rules that would have a significant adverse effect on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets).<sup>46</sup>

As used in this report, the term “independent regulatory agencies” refers to agencies established to be independent of the President, including the Federal Communications Commission (FCC) and the Securities and Exchange Commission (SEC). The term “independent agencies” refers to agencies that are independent of Cabinet departments but are not independent regulatory agencies (e.g., EPA and OPM).<sup>47</sup>

The RFA applies to rulemakings whenever an agency publishes a notice of proposed rulemaking pursuant to section 553(b) of the Administrative Procedure Act, or some other law. Agencies must perform an initial regulatory flexibility analysis whenever they determine that a rule will have a “significant economic impact on a substantial number of small entities.”<sup>48</sup> Those terms are not defined in the RFA, because their meaning is intended to vary based on the requirements of each proposed regulation. The RFA applies to rules issued by Cabinet departments, independent agencies, and independent regulatory agencies.

## 2. Methodology

To address the first objective, the author used the “Regulatory Review” database at [Reginfo.gov](http://www.reginfo.gov) to identify proposed and final rules that were reviewed by OIRA under Executive Order 12866 and that were published in the *Federal Register* during the first

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<sup>46</sup> See p. 5 of OMB guidance on the Congressional Review Act, available at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m99-13.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m99-13.pdf).

<sup>47</sup> For a more detailed discussion of types of agencies, see David E. Lewis and Jennifer L. Selin, *Sourcebook of United States Executive Agencies*, First Edition, December 2012, prepared for the Administrative Conference of the United States, available at [http://www.acus.gov/sites/default/files/documents/Sourcebook-2012-Final\\_12-Dec\\_Online.pdf](http://www.acus.gov/sites/default/files/documents/Sourcebook-2012-Final_12-Dec_Online.pdf).

<sup>48</sup> See 5 U.S.C. § 603.

six months of 2014 (January 1, 2014, through June 30, 2014).<sup>49</sup> Focusing on rules that had been reviewed by OIRA ensures that they were “significant” (since OIRA only reviews significant regulatory actions), and were therefore likely to be of some consequence to the general public. Such rules may also be more likely to have been under development for some time than non-significant rules, and therefore may be more likely to have been preceded by a Unified Agenda entry.

However, this approach does not include rules issued by independent regulatory agencies like the SEC and FCC, whose rules are not reviewed by OIRA under Executive Order 12866. In an effort to include at least some of these agencies’ rules in the study, the author reviewed all of the rules published by seven independent regulatory agencies during the first six months of 2014, and determined which ones appeared to be “significant” (e.g., rules that were not simply reopening a comment period, correcting or supplementing an earlier proposed rule, or dealing with a relatively minor issue in a rule that was only a few pages in the *Federal Register*). The seven independent regulatory agencies whose rules from this period were reviewed were the SEC, the Commodity Futures Trading Commission (CFTC), the Nuclear Regulatory Commission (NRC), the Bureau of Consumer Financial Protection (CFPB), the Federal Deposit Insurance Corporation (FDIC), the FCC, and the Federal Reserve System (FRS). Previous research indicated that among independent regulatory agencies, these agencies issued the largest numbers of substantive rules.<sup>50</sup>

Section 4(b) of Executive Order 12866 requires that each regulatory action in the Unified Agenda contain a regulation identifier number (RIN), and those numbers are assigned by RISC. An April 7, 2010, memorandum from the OIRA Administrator to the President’s Management Council went further, stating that agencies should use RINs “on all relevant documents throughout the entire ‘lifecycle’ of a rulemaking. In addition to increasing transparency, making it easier for members of the public to find and view all online information relevant to the regulatory docket will help inform their understanding of both the rulemaking process and the content of particular rules, thereby promoting public participation in the rulemaking process.”<sup>51</sup>

Using RINs and other information, the author of this report traced the significant proposed and final rules that were published during the first half of 2014 back to Unified

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<sup>49</sup> See <http://www.reginfo.gov/public/do/eoAdvancedSearchMain> to identify the significant rules reviewed by OIRA that were published during this period. For searches of the Unified Agenda, see <http://www.reginfo.gov/public/do/eAgendaSimpleSearch> for simple searches. This website also permits advanced searches of individual editions of the agenda. This six-month period was chosen because it was the most recent when the research began, and contained a reasonable number of significant rules. There is no reason to believe that rules published during this period are atypical when compared to rules published during other periods.

<sup>50</sup> Curtis W. Copeland, *Economic Analysis and Independent Regulatory Agencies*, April 30, 2013, available at <http://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf>.

<sup>51</sup> See [http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/IncreasingOpenness\\_04072010.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/IncreasingOpenness_04072010.pdf). The President’s Management Council (PMC) advises the President and OMB on government reform initiatives, provides performance and management leadership throughout the Executive Branch, and oversees implementation of government-wide management policies and programs. The PMC comprises the Chief Operating Officers of major federal agencies, primarily Deputy Secretaries, Deputy Administrators, and agency heads from the GSA and the OPM. See <http://www.gsa.gov/portal/content/133811> for more information.

Agendas published during the previous three years (i.e., back to the Spring 2011 edition) to determine if those agendas indicated that the rules were forthcoming. Rules that were published with no prior Unified Agenda entry were identified, and agencies with a number of such rules were queried as to why the agendas did not indicate that the rules would be issued.

Another way to examine whether final rules are being issued without a prior agenda entry is to analyze “completed” entries that had never been previously been listed in the agenda. (Regulatory actions are most often “completed” when agencies publish final rules and those rules go into effect.) Therefore, the author examined all of the completed actions in the Fall 2014 edition of the agenda that were also identified as appearing in the agenda for the first time, and attempted to determine why they had not been previously listed in the agenda. This analysis is presented in Appendix B of this report.

To address the second objective, the study focused on “economically significant” “proposed rule stage” and “final rule stage” entries in the Spring 2013 Unified Agenda that was issued on July 2, 2013 (i.e., entries indicating that a significant proposed or final rule would be issued within the next 12 months).<sup>52</sup> The economically significant entries were traced by RIN and other information to the *Federal Register* to determine whether those proposed or final rules were, in fact, issued in the succeeding 16 months (i.e., 12 months with an additional four-month grace period). Agenda entries without a succeeding proposed or final rule were identified, and agencies with a number of such entries were queried as to why the rules were not issued.

To address the third objective, the study focused on the proposed and final rules that were published during the first six months of 2014 that were predicted by previous Unified Agendas (based on findings from the first objective). Information in the agenda entries about those forthcoming rules (e.g., whether a rule was “economically significant” and when it was expected to be issued) was compared to information provided in the rule itself. Agenda entries that differed from the information in the published rules were identified, and senior agency employees were asked why the differences occurred.

The final objective was addressed using information derived from the first three objectives. In addition, interviews were conducted with senior agency employees in the agencies where large numbers of discrepancies were discovered (e.g., agencies that issued a large number of rules without a preceding Unified Agenda entry, and those with large numbers of agenda entries that did not result in a published rule), and in some agencies without such discrepancies.<sup>53</sup> Interviews were also conducted with staff at RISC and OIRA, and with other individuals and organizations that use the Unified Agenda.

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<sup>52</sup> “Economically significant” entries were focused on in this section of the report instead of just “significant” entries” because the Spring 2013 edition of the agenda contained more than 900 “significant” entries at the proposed and final rule stages, and tracing that many entries would have been extremely difficult.

<sup>53</sup> Most of these interviews were conducted over the phone, although one agency would only provide written information in response to questions.

### 3. Scope

Agency staff members interviewed for this report were primarily senior employees responsible for interactions with RISC and OIRA regarding the Unified Agenda. A total of 17 senior employees were interviewed, representing 12 cabinet departments and agencies that typically have numerous entries in the agenda. To allow these employees to comment as candidly as possible, they were generally allowed to provide their views anonymously, and were assured that the names of their agencies would not be disclosed. This report does not seek to capture the extent to which their views are representative of the agencies for which they work, or of other agencies.

This study focuses on the Unified Agenda, and does not attempt to address other parts of the regulatory planning process described in Section 4 of EO 12866 or elsewhere (e.g., the Regulatory Plan, or the annual policy meeting).<sup>54</sup> The study also does not attempt to address why only one edition of the agenda was published in 2012, or why several recent editions of the agenda have been published later than usual.<sup>55</sup> In addition, the study does not attempt to determine in any detail how the public or agencies use the agenda information, or the agenda's importance as a source of regulatory information compared to other possible sources.

As indicated previously, agencies may issue rules that have never appeared in the Unified Agenda, and may never issue rules that are in the agenda. Nevertheless, because so many individuals and organizations use or recommend using information from the Unified Agenda, it is appropriate to determine the extent to which the Agenda can be relied upon to provide an accurate indication of agencies' forthcoming rulemaking activities. Also, the study may indicate ways that the Agenda can be improved to promote greater rulemaking transparency, planning, and public participation.

Before addressing the study's four primary objectives, the report first (1) discusses the agenda's components and development process, and provides data on the number of entries in recent agendas by edition and by agency; and (2) provides information on "pending" rulemaking actions that are kept in the data system used to develop the agenda, but that are not shown to the public.

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<sup>54</sup> However, the study does briefly compare the requirements for the Regulatory Plan to the agenda requirements in the executive order.

<sup>55</sup> As noted previously in this report, the Regulatory Flexibility Act requires that agendas be published in April and October. The Fall 2012 edition of the agenda was not published until December 21, 2012, and the Spring 2013 edition was not published until July 1, 2013. See Ben Goad and Julian Hatten, "After criticism, administration releases belated regulatory roadmap," *The Hill*, July 3, 2013, available at <http://thehill.com/regulation/pending-regs/309257-administration-releases-belated-regulatory-roadmap->. See also letter from James W. Conrad, Jr., Chair, Section of Administrative Law and Regulatory Practice, American Bar Association, to Boris Bershteyn, Acting Administrator of OIRA, "Re: Spring and Fall 2012 Unified Regulatory Agenda," November 30, 2012, expressing concern about the then unpublished Spring 2012 agenda, available at [http://www.americanbar.org/content/dam/aba/administrative/administrative\\_law/unified\\_regulatory\\_agendas\\_letter.aut\\_hcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/administrative_law/unified_regulatory_agendas_letter.aut_hcheckdam.pdf).

### III. Agenda Components and Development Process

Section 4(b) of Executive Order 12866 permits the OIRA administrator to specify the timing and the substance of agencies' regulatory agendas. According to the RISC instructions for reporting regulatory actions in the agenda, agencies need not include in their agendas actions that are excluded by Section 3(d) of the executive order (e.g., rules issued in accordance with the formal rulemaking procedures in 5 U.S.C. 556 and 557, and rules that only pertain to military or foreign affairs functions), or "routine regulations and those that relate to internal agency management."<sup>56</sup> The process by which the Unified Agenda is compiled is initiated by an OIRA memorandum to the agencies (sometimes referred to as a "data call"), but also contains other steps that have developed over time. The agenda is generally organized by agency and in terms of five stages of rulemaking, and each agenda entry contains certain standardized categories of information about forthcoming or completed regulatory actions.

#### A. Stages of Rulemaking and Other Agenda Elements

Each Unified Agenda entry is associated with one of five rulemaking stages:

- prerule stage (indicating actions agencies will take to determine whether or how to initiate rulemaking, such as advance notices of proposed rulemaking (ANPRM) and reviews of existing rules);
- proposed rule stage (indicating that the agency plans to issue a notice of proposed rulemaking, or to close an existing NPRM comment period);
- final rule stage (indicating that the agency plans to issue a final rule, an interim final rule, or take other final action as the next step);
- long-term actions (indicating items under development, but that are not expected to result in a regulatory action in the next 12 months); and
- completed actions (e.g., reflecting the publication of a final rule or the withdrawal of a rule since the last agenda was published).

Only the first three of these rulemaking stages are considered "active" agenda actions. Each agenda entry also provides a variety of information about the forthcoming regulatory action,<sup>57</sup> including:

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<sup>56</sup> Regulatory Information Service Center, "Instructions for Reporting Regulatory Actions in the Unified Agenda," available from the author.

<sup>57</sup> The following bulleted information is from the introduction to the current Unified Agenda, available at [http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201404/Preamble\\_8888.html](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201404/Preamble_8888.html).

<sup>57</sup> See [https://www.rocis.gov/rocis/jsp3/common/ROCIS\\_How\\_to\\_Guide\\_for\\_Agenda\\_Users\\_070214\\_v2.pdf](https://www.rocis.gov/rocis/jsp3/common/ROCIS_How_to_Guide_for_Agenda_Users_070214_v2.pdf), p. ii.

- The priority of the regulation in terms of one of five categories:
  - “economically significant” (i.e., whether the action will have an annual effect on the economy of \$100 million or more or will adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities);
  - “other significant” (i.e., not economically significant but significant under Executive Order 12866, including rules that are a priority of the agency head);
  - “substantive, nonsignificant” (i.e., a rulemaking that has substantive impacts but is neither “significant,” nor “routine and frequent,” nor “informational/administrative/other”);
  - “routine and frequent” (i.e., a rulemaking that is a specific case of a multiple recurring application of a regulatory program in the *Code of Federal Regulations* and that does not alter the body of the regulation); or
  - “informational/administrative/other” (i.e., a rulemaking that is primarily informational or pertains to agency matters not central to accomplishing the agency's regulatory mandate but that the agency places in the Unified Agenda to inform the public of the activity).
- Whether the rule is “major” under the Congressional Review Act because it has resulted or is likely to result in an annual effect on the economy of \$100 million or more or meets other criteria specified in that Act.
- The dates and citations (if available) for all past steps and a projected date for at least the next step for the regulatory action.<sup>58</sup>
- Whether the Regulatory Flexibility Act requires an analysis “because the rulemaking action is likely to have a significant economic impact on a substantial number of small entities.”

Also, as noted previously, Section 4(b) of Executive Order 12866 requires that agencies include a Regulation Identifier Number (RIN) for each regulatory action listed in the agenda. RISC assigns those numbers at the request of the issuing agencies.

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<sup>58</sup> A date displayed in the form “06/00/14” means the agency is predicting the month and year the action will take place but not the day it will occur. In some instances, agencies may indicate what the next action will be, but the date of that action is “To Be Determined.” “Next Action Undetermined” indicates the agency does not know what action it will take next.

## **B. The Agenda Development Process**

The information used to develop the Unified Agenda is maintained in the RISC/OIRA Consolidated Information System (ROCIS). According to the ROCIS Agency User Manual, RISC and OIRA use ROCIS to carry out three related coordination and oversight functions: (1) compilation of the Unified Agenda and the Regulatory Plan, (2) OIRA's review of regulatory actions under Executive Order 12866, and (3) OIRA's review of information collections under the Paperwork Reduction Act (PRA).<sup>59</sup> Information on all three functions is available to the public on the Reginfo.gov website (<http://www.reginfo.gov/public/>). The public information on OIRA's reviews under EO 12866 and information collections under the PRA are usually updated each workday, but the information on the Unified Agenda is only updated twice each year when the agenda is published.

The data for these three functions are electronically linked through ROCIS. For example, clicking on the highlighted RIN for any of the rules that are or have been under review at OIRA pursuant to EO 12866 usually brings up the most recent Unified Agenda listing for the rule. Using this linkage to compare the projected issuance date with the ongoing or completed OIRA review date allows the user to know whether the projected issuance date in the agenda is still feasible. For example, a draft final rule from the Department of Agriculture's Food Safety Inspection Service (USDA/FSIS) on "Common or Usual Name for Raw Meat and Poultry Products Containing Added Solutions" (RIN 0583-AD43) was submitted to OIRA for review on April 30, 2014, and was still under review as of November 2014. Clicking on the highlighted RIN indicates that according to the Spring 2014 Unified Agenda, final action on the rule was expected in July 2014 – a date that was obviously not met because the draft rule was still under review at OIRA four months later. (In the Fall 2014 agenda, the agency changed the estimated date for final action to December 2014.)

ROCIS is accessible to federal agencies via the Internet, and is the primary method by which agencies obtain RINs for their rules and provide regulatory data for publication in the agenda. ROCIS also "offers the capability to exchange data with agencies' own tracking systems using browser-based file transfer and XML."<sup>60</sup> The Department of Transportation (DOT), EPA, and a few other agencies currently transfer files to ROCIS in this manner when the agenda is being prepared.

### **1. OIRA Data Calls**

Twice each year, three to six months before the agenda is published, OIRA sends a "data call" memorandum to the agencies instructing them as to the contents of the forthcoming

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<sup>59</sup> See [https://www.rocis.gov/rocis/jsp3/common/ROCIS\\_How\\_to\\_Guide\\_for\\_Agenda\\_Users\\_070214\\_v2.pdf](https://www.rocis.gov/rocis/jsp3/common/ROCIS_How_to_Guide_for_Agenda_Users_070214_v2.pdf), p. ii.

<sup>60</sup> *Ibid.*, p. 2.

agenda, and when their submissions should be submitted to RISC. As **Table 1** below indicates, in 2010, 2011, and 2012, federal agencies had an average of more than two months to prepare their Fall agenda submissions (which also included the agencies' Regulatory Plans), but OIRA required the information for the Fall 2013 and the Fall 2014 editions of the agenda to be submitted to RISC only a little more than three weeks after the dates of the OIRA memoranda – much less time than during the previous cycles.<sup>61</sup> Agencies also had somewhat less time to prepare their Spring agenda submissions in 2013 and 2014 than during 2011 and 2012.<sup>62</sup>

**Table 1: Dates of OIRA Memoranda, Required Submission, and Agenda Publication: Fall 2010 through Fall 2014**

Unified Agenda Edition	Date of OIRA Memo	Date Info Required to RISC	Days Between Memo and Submission	Date Agenda Published	Days Between Submission and Published
Fall 2010	07/23/2010	09/10/2010	49	11/29/2010	80
Spring 2011	01/21/2011	02/25/2011	35	06/01/2011	97
Fall 2011	06/30/2011	09/09/2011	71	12/19/2011	102
Spring 2012	03/12/2012	04/13/2012	32	Not published	--
Fall 2012	06/13/2012	09/07/2012	86	12/21/2012	105
Spring 2013	03/28/2013	04/24/2013	27	07/01/2013	68
Fall 2013	08/07/2013	08/29/2013	22	11/26/2013	89
Spring 2014	02/04/2014	02/28/2014	24	05/23/2014	110
Fall 2014	08/25/2014	09/19/2014	25	11/21/2014	63

Source: OIRA website for OIRA memo dates and date required to RISC, and Unified Agenda at Reginfo.gov for dates of the agendas.

**Table 1** also indicates that the number of days between submission of the agenda information to RISC and the agenda publication date has in recent cycles far exceeded the amount of time that agencies have had to prepare those submissions. For example, for the Spring 2014 edition of the agenda, agencies had only 24 days to prepare their agenda submissions, but it took 110 days after the required submission date for RISC to publish the agenda. Although preparation of the Fall 2014 agenda took only 63 days after the required submission date, that was still more than twice as long as the agencies had to prepare those submissions. Because of the long period between the date the agenda information is required to be submitted to RISC and the publication of the agenda, some of the senior agency employees interviewed for this report said the agenda information is often out of date by the time the agenda is published.

<sup>61</sup> In the 2010-2012 period, agencies had an average of 79 days after the OIRA data call to submit their fall agenda entries; in 2013 and 2014, the agencies had only 24 days to submit their fall agenda entries.

<sup>62</sup> Senior agency employees said agencies that must have their agenda information approved by Cabinet departments have even less time to prepare the information. For example, while Cabinet departments had 25 days to submit their agenda information to RISC for the Fall 2014 agenda, the agencies within a department may have had to provide their information several days in advance to allow time for departmental review.

However, the actual process used to develop the Unified Agenda can be somewhat more flexible than the dates in **Table 1** would lead one to believe. For example, some of the senior agency employees interviewed for this report said that they begin compiling their data call submissions in advance of the OIRA memorandum, knowing about when they are typically issued. Also, as discussed below, agencies often update their agenda entries after the submission deadline (up to about a month before the agenda is published), and some do so even after the agenda is published. Finally, OIRA officials interviewed for this report indicated that not all agencies submit their agenda entries by the stated deadline, and said OIRA spends some of the time after the deadline tracking down late submissions.

Recent OIRA data call memoranda have contained several suggested steps to improve the agencies' agendas. For example, all such memoranda since at least 2010 have:

- Stated “many entries are listed with projected dates that have simply been moved back year after year, with no action taken. Unless you realistically intend and have the resources to take action over the next 12 months, please consider removing these items from the Agenda.”<sup>63</sup>
- Instructed agencies to “make a sincere effort to ensure the accuracy of timetable information,” since those timetables are “important for public understanding of the timeframes for participation in the regulatory process.”
- Said that the effort to improve the content of the agenda “should include an emphasis on the consistency of the data,” and have told agencies to be sure that their responses for such items as “priority” and “major” are consistent.

Most data call memoranda since at least 2010 have also told agencies that a large number of agenda entries in the “long-term” category have been included in recent agendas even though no real activity is expected within the coming year. Agencies were told to “consider terminating the listing of such entries until some action is likely to occur, unless early announcement has some benefit to readers.” However, this instruction was not included in the August 2014 data call memorandum for the Fall 2014 agenda.

The RISC Executive Director said that some agencies with their own rule tracking systems (e.g., DOT and EPA) submit the information to RISC electronically, which he said greatly simplifies the agenda development process for RISC. He said that RISC staff members each work with the same agencies during every agenda cycle, which also helps the process move more smoothly.

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<sup>63</sup> The language used in these data call memoranda is somewhat different, but the quotes here and below are from the March 28, 2013, memorandum.

## **2. Reviews of Agency Submissions**

The RISC Executive Director said that during the period after the data call deadline but before the agenda is published, RISC reviews agencies' submission and attempts to identify any possible inconsistencies or errors. For example, he said if an agency identifies a forthcoming or published rule as "economically significant" but also says the rule is not "major" under the Congressional Review Act, RISC will alert the agency about this possible inconsistency. Ultimately, however, he said it is the agencies' call how their rules are characterized in the agenda, and RISC does not force the agencies to reconcile such differences.

The senior agency employees said that after new agenda entries and updates are provided to RISC in response to the OIRA data call, the information is provided to the agency's desk officer at OIRA, who reviews the agenda submissions and gives feedback to the agency. The agency employees said that OIRA desk officers only rarely suggest that agenda items be added or taken out of the agenda, and said the content of the agenda is usually the agency's call. The agency then makes changes pursuant to those comments, and then resubmits the information to RISC. Some of the senior employees said the OIRA desk officers often do not ask questions for weeks after the required submission date, and then the questions are almost always about projected issuance dates, with OIRA sometimes questioning whether certain dates can be met, and in other cases suggesting that publication dates be moved up.

A few weeks or a month prior to publication of the agenda, a final "galley proof" is provided to the agency,<sup>64</sup> the agency makes one last check to be sure the information is correct, and the final agenda information is submitted to RISC. The RISC Executive Director said agencies often update their agenda entries at this point to reflect new information. However, he said such last-minute updates are done by most, but not all agencies, so the "snapshot" that is later published as the Unified Agenda may reflect conditions only a few weeks prior to the publication date, or conditions that occurred some time earlier in the agenda-development process (e.g., the date that the OIRA data call first requires the agenda information to be provided to RISC). After the "galley proof" reviews, he said the ROCIS system is "locked" and agencies are not permitted to make any further changes for about the final week of processing, which facilitates publication. During this time, he said agencies may provide any additional corrections, updates, and changes to the appropriate RISC analyst.

## **3. Updates to Information Outside of Data Calls**

The ROCIS User Manual states that agencies "may update your agenda data at any time prior to submission."<sup>65</sup> The RISC Executive Director and the senior agency employees

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<sup>64</sup> These "galley proofs" are no longer provided in hard copy. Instead, agencies are permitted to review the information in ROCIS at this point.

<sup>65</sup> Ibid., p. 41.

said that a few weeks after one edition of the agenda is published, RISC notifies agencies that ROCIS is “open,” meaning that the agencies are allowed to go into the system and update their existing agenda information. For example, if an agency indicated in the Fall 2014 edition of the agenda that a proposed rule was expected to be issued in March 2015, but that rule was actually published in February 2015, the agency could go into ROCIS in February 2015 and provide the actual publication date and *Federal Register* citation without waiting for the next OIRA data call. However, these updates between data calls are only made in ROCIS, and are not made to the agenda information that is visible to the public.

The RISC Executive Director said that some agencies are “constantly” updating their agenda entries in ROCIS prior to the next edition of the agenda – so much so that when the formal OIRA data call is actually sent to the agencies, many of the agencies have already made most of the major changes needed to their entries. He said rulemaking agencies are “very attentive to getting it right,” and both he and senior agency employees said these pre-data call efforts make the changes that have to be made after the data call much more manageable. However, other senior employees said that their agencies do not update their agenda entries between cycles, preferring to wait for the data calls in the event that the agenda information changed again before it was required to be submitted.

### **C. Total Number of Agenda Entries Declines**

As **Table 2** below indicates, from 2006 through 2012, the total number of entries in the Unified Agenda varied somewhat but was always within a range from just under 3,900 entries to 4,300 entries. During this period, federal agencies published an average of 4,037 entries per edition of the agenda. However, since 2012, the agencies have published an average of only 3,393 entries per agenda – an average of 644 fewer entries per edition than during the earlier period (a 16% decrease). The primary cause of this decline has been a sharp drop in the long-term action category in recent years. From 2006 through the Spring 2011 edition of the agenda, federal agencies published an average of 764 long-term actions in each agenda edition, but since then have published an average of only 461 such actions per edition – an average of more than 300 fewer long-term actions per agenda (a 40% decrease). A smaller decrease in the number of “active” agenda entries (pre-rule, proposed rule, and final rule stage) and completed actions also contributed to the decline in the number of total agenda entries in 2013 and 2014.

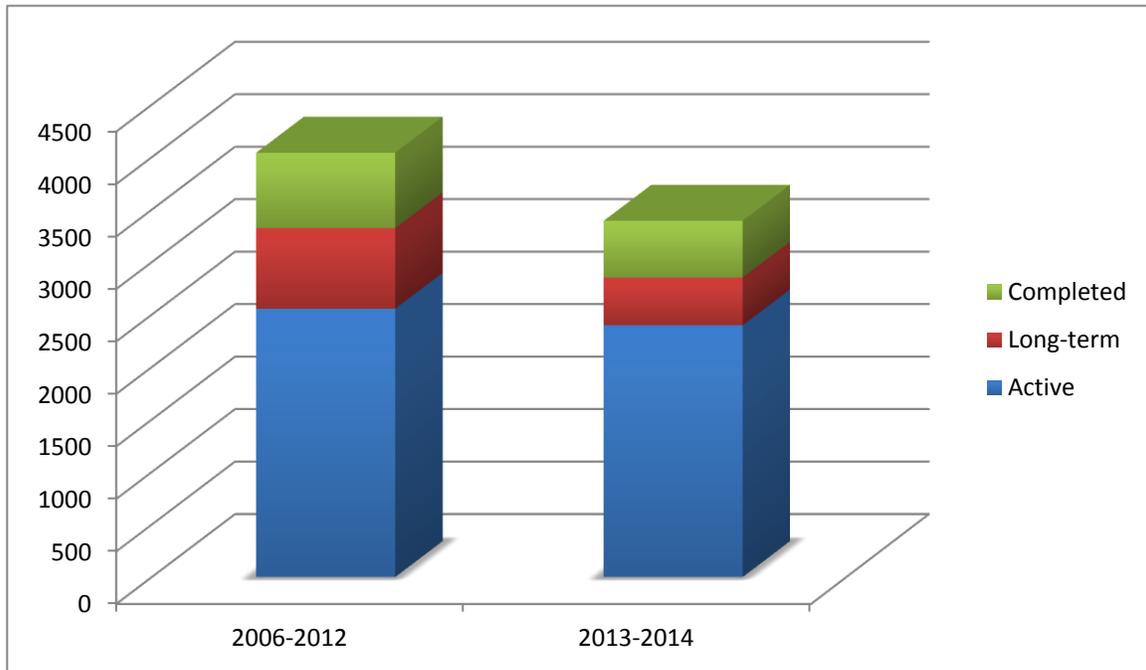
**Table 2: Unified Agenda Entries by Rulemaking Stage: 2006 - 2014**

Agenda Edition	Active Stages			Long-term Action	Completed Action	Total Agenda Entries
	Pre-rule	Proposed Rule	Final Rule			
Spring 2006	79	1311	1197	822	686	4095
Fall 2006	73	1155	1162	871	851	4052
Spring 2007	68	1259	1105	577	874	3883
Fall 2007	76	1226	1122	684	774	3882
Spring 2008	84	1272	1132	785	612	3885
Fall 2008	84	1241	1166	849	691	4031
Spring 2009	97	1271	1111	821	689	3989
Fall 2009	95	1370	1165	744	669	4043
Spring 2010	89	1464	1123	716	551	3943
Fall 2010	79	1420	1197	807	722	4225
Spring 2011	79	1509	1276	726	667	4257
Fall 2011	100	1399	1177	<b>442</b>	<b>1010</b>	4128
2012	82	1242	1063	<b>504</b>	<b>1172</b>	4063
Spring 2013	85	1310	1087	<b>465</b>	556	<b>3503</b>
Fall 2013	92	1317	988	<b>446</b>	462	<b>3305</b>
Spring 2014	98	1291	1000	<b>441</b>	518	<b>3348</b>
Fall 2014	102	1231	988	<b>465</b>	629	<b>3415</b>

Source: Unified Agenda at Reginfo.gov.

**Figure 1** below shows the same data, but summarized for comparison of the 2006-2012 period to the 2013-2014 period. As the figure shows, the average number of total agenda entries in the 2006-2012 period was much higher than during the 2013 and 2014. The component parts were also different during the two periods, with the largest difference (a more than 40% drop) in the “long-term action” category. The average number of completed actions was also somewhat lower in the 2013-2014 time period, as was average number of active entries.

**Figure 1: Comparison of 2006-2012 Period to 2013-2014 Period in Average Number of Agenda Entries and Component Parts**



Note: In the 2006-2012 period, there were an average of 4,037 agenda entries per year (2,555 active entries, 719 long-term actions, and 767 completed entries). In the 2013-2014 period, there were an average of 3,393 entries per year (2,397 active entries, 454 long-term actions, and 541 completed actions).

Notably, there has not been a corresponding decrease in the number of final rules published in the *Federal Register*. From 2006 through 2012, federal agencies published an average of 3,665 final rules each year; in 2013 and 2014, the agencies published an average of 3,600 final rules each year. Therefore, the drop in the number of agenda entries in recent years cannot be attributed to a drop in rulemaking activity. Also, as **Table 3** below shows, 2013 and 2014 were the only years during this period in which the number of final rules published in the *Federal Register* exceeded the average number of Unified Agenda entries for that year.<sup>66</sup>

<sup>66</sup> In fact, in every year since 1999, the average number of agenda entries has been greater than the number of final rules published in the *Federal Register*. However, from 1996 through 1998, the average number of agenda entries was less than the number of final rules published.

**Table 3: Comparison of Number of Unified Agenda Entries to Number of Final Rules: 2006 through 2014**

<b>Year</b>	<b>Average Number of Unified Agenda Entries</b>	<b>Number of Final Rules Published in the <i>Federal Register</i></b>	<b>Number of Final Rules Divided by Average Number of Unified Agenda Entries (Percent)</b>
2006	4,074	3,730	91.6
2007	3,883	3,594	92.6
2008	3,958	3,820	96.5
2009	4,016	3,456	86.1
2010	4,084	3,563	87.3
2011	4,193	3,781	90.2
2012	4,063	3,714	91.4
<b>2013</b>	<b>3,404</b>	<b>3,659</b>	<b>107.5</b>
<b>2014</b>	<b>3,382</b>	<b>3,541</b>	<b>104.7</b>

Source: Unified Agenda at Reginfo.gov and Federal Register.

## 1. OIRA Recommended Reducing Long-Term Actions

The decline in the number of “long-term action” entries after the Spring 2011 edition of the agenda appears to have occurred at the direction of OIRA. According to RISC, the OIRA data call memoranda for the past 10 years have contained something like the following:

In recent years, a large number of Unified Agenda entries have been for regulatory actions for which no real activity is expected within the coming year. Many of these entries are listed as “Long-Term.” Please consider terminating the listing of such entries until some action is likely to occur, unless early announcement has some benefit to readers.<sup>67</sup>

The data in **Table 2** above indicate that those instructions were not immediately heeded (since the number of long-term actions remained over 700 in the Fall 2010 and Spring 2011 editions of the agenda), but the instructions appear to have been followed starting with the Fall 2011 edition of the agenda. As discussed in the next major section of this report, the Fall 2011 edition of the agenda also appears to be when OIRA and RISC created the “pending” category in ROCIS. Senior agency employees interviewed for this report indicated that many of the regulatory actions previously shown in the long-term action category in the agenda (and in some other categories) are now kept in the “pending” category in ROCIS.

<sup>67</sup> Memorandum from the OIRA Administrator to regulatory policy officers and others regarding the Fall 2010 Unified Agenda, July 23, 2010, available at [http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/Fall\\_2010\\_Reg\\_Plan\\_Agenda\\_Data\\_Call.pdf](http://www.whitehouse.gov/sites/default/files/omb/inforeg/regpol/Fall_2010_Reg_Plan_Agenda_Data_Call.pdf).

## **D. Number of Agenda Entries by Agency**

**Tables 4 and 5** below show the number of entries in the Spring 2014 Unified Agenda and the Fall 2014 agenda by agency and stage of rulemaking. In each of these two editions of the agenda, two Cabinet departments each had more than 300 entries – the Department of the Treasury (Treasury) and the Department of the Interior (DOI), with each of those departments' totals driven largely by one agency within each department (the Internal Revenue Service within Treasury, and the Fish and Wildlife Service (FWS) within DOI). Three other Cabinet departments each had more than 200 entries – the Department of Commerce (DOC), DOT, and HHS.

**Table 4: Entries in the Spring 2014 Unified Agenda by Department/Agency and Stage of Rulemaking**

Department/ Agency	Active Stages			Long-term Action	Completed Action	Total Agenda Entries
	Prerule	Proposed Rule	Final Rule			
USDA	2	65	54	8	22	151
DOC	1	110	71	11	64	257
DOD	0	48	53	1	26	128
Education	0	15	5	0	2	22
DOE	9	49	20	4	21	103
HHS	3	99	50	23	30	205
DHS	4	37	54	36	11	142
HUD	1	15	23	2	7	48
DOI	9	170	96	17	37	329
DOJ	1	36	38	17	3	95
DOL	12	37	20	11	11	91
State	0	18	15	0	7	40
DOT	5	95	56	18	35	209
Treasury	2	161	185	24	55	427
VA	0	21	25	1	23	70
EPA	6	77	49	34	23	189
NASA	0	8	11	0	6	25
OPM	0	21	22	0	15	58
SBA	0	17	6	0	6	29
SSA	1	17	14	4	5	41
CFPB	4	6	4	5	5	24
CFTC	1	16	6	1	7	31
FCC	0	0	0	135	7	142
FDIC	0	4	7	1	5	17
FRS	1	11	4	0	13	29
NRC	3	15	10	24	4	56
SEC	0	20	22	6	1	49
All Others	33	103	80	14	67	297
Total	98	1291	1000	441	518	3348

Source: Spring 2014 Unified Agenda at [Reginfo.gov](http://Reginfo.gov).

Note: Acronyms not previously introduced include HUD (Department of Housing and Urban Development), DOJ (Department of Justice), DOL (Department of Labor), VA (Department of Veterans Affairs), NASA (National Aeronautics and Atmospheric Administration), and SSA (Social Security Administration).

**Table 5: Entries in the Fall 2014 Unified Agenda by Department/Agency and Stage of Rulemaking**

Department/ Agency	Active Stages			Long-term Action	Completed Action	Total Agenda Entries
	Prerule	Proposed Rule	Final Rule			
USDA	1	55	67	2	35	160
DOC	2	74	89	20	85	270
DOD	0	47	51	0	23	121
Education	0	12	9	0	5	26
DOE	11	51	29	4	10	105
HHS	3	92	55	27	40	217
DHS	2	37	39	46	17	141
HUD	0	18	20	2	15	55
DOI	6	143	80	15	80	324
DOJ	2	40	40	15	5	102
DOL	13	39	23	15	5	95
State	0	10	15	10	12	47
DOT	4	96	58	25	33	216
Treasury	2	169	148	28	79	426
VA	0	26	30	2	17	75
EPA	3	78	48	26	31	186
NASA	0	8	5	1	8	22
OPM	0	17	14	0	36	67
SBA	5	14	7	1	3	30
SSA	1	10	16	7	5	39
CFPB	3	4	6	4	4	21
CFTC	1	17	5	0	3	26
FCC	0	1	0	128	3	132
FDIC	0	7	10	2	6	25
FRS	2	8	6	0	7	23
NRC	4	9	13	26	8	60
SEC	2	26	26	5	2	61
All Others	35	123	79	54	52	343
Total	102	1231	988	465	629	3415

Source: Fall 2014 Unified Agenda at [Reginfo.gov](http://Reginfo.gov).

## E. Almost No Active FCC Agenda Entries for Years

Note in **Tables 4 and 5** above that the FCC had no active entries in the Spring 2014 agenda, and only one active entry in the Fall 2014 edition (a proposed rule stage entry). Virtually all of the FCC’s entries in both years were in the “long-term action” category. A longer-term view reveals that the FCC has had only two “proposed rule stage” agenda entries since 2006, and has had no “final rule stage” entries since the Spring 1999 edition of the agenda. The two “proposed rule stage” entries since 2006 (one in the Fall 2013 edition of the agenda and one in the Fall 2014 edition) were both for NPRMs that had already been published – not for upcoming proposed rules.<sup>68</sup> As **Table 6** below indicates, for at least the last 15 editions of the Unified Agenda, the FCC has put almost all of its agenda entries in the “long-term action” category. As a result, the public relying on the agenda for information has no clear idea whether, and if so when, the FCC will take action on its proposed or final rules.

**Table 6: FCC Unified Agenda Entries by Stage of Rulemaking, Spring 2007 Through Fall 2014**

Agenda Edition	Prerule	Proposed Rule	Final Rule	Long-term Action	Completed Action	Total
Spring 2007	1	0	0	135	3	139
Fall 2007	0	0	0	134	11	145
Spring 2008	0	0	0	136	3	139
Fall 2008	0	0	0	142	1	143
Spring 2009	0	0	0	137	12	149
Fall 2009	0	0	0	139	6	145
Spring 2010	0	0	0	137	10	147
Fall 2010	0	0	0	145	2	147
Spring 2011	0	0	0	147	11	158
Fall 2011	0	0	0	103	0	103
2012	0	0	0	117	1	118
Spring 2013	0	0	0	122	6	128
Fall 2013	0	1	0	131	0	132
Spring 2014	0	0	0	135	7	142
Fall 2014	0	1	0	128	3	132

Source: Unified Agenda at [Reginfo.gov](http://Reginfo.gov).

<sup>68</sup> The “Further Notice of Proposed Rulemaking” was published on August 20, 2013 (78 FR 51559); the Fall 2013 edition of the agenda was posted on November 26, 2013.

The FCC does, however, publish a substantial number of proposed and final rules each year. From January 1, 2007, through December 31, 2014, the FCC published nearly 1,800 proposed and final rules in the *Federal Register* – an average of about 250 per year during this period. A previous report for ACUS indicated that from 2007 through 2012, the FCC published more than three times as many final rules as any other independent regulatory agency.<sup>69</sup>

An FCC staff person told the author of this report that the FCC uses the Unified Agenda differently than other agencies – to document the publication of regulatory actions, not to inform the public about forthcoming actions. (She said the “proposed rule stage” entries in the Fall 2013 and Fall 2014 agendas were “probably a mistake,” and should have been in the long-term action category.) She said that the agency puts all of its ongoing rulemaking actions in the “long-term action” category because it is often unclear what the next step in the FCC rulemaking process will be. FCC rulemaking is often iterative, with multiple NPRMs and multiple “reports and orders,” making the prediction of subsequent stages of rulemaking difficult.<sup>70</sup> She said RISC and OIRA have reviewed FCC agenda entries for years, and have never suggested that the agency’s approach to the agenda was different than other agencies or should be changed.

## IV. “Pending” Rulemaking Actions That Are Not Shown to the Public

In addition to the five rulemaking stages used in the publicly available Unified Agenda (prerule, proposed rule, final rule, long-term action, and completed action), RISC also maintains what is effectively a sixth category in ROCIS – called “pending” – that is not visible to the public, and not even widely known to exist except by those involved in preparing the agenda. The “pending” category appears to have been created in 2011. At about the same time, OIRA reportedly decided that the Unified Agenda should reflect only rules that were actually being considered for issuance by the agencies, and the agencies were informed (through the OIRA desk officers) that what were informally termed “old and cold” entries (i.e., those that were not being actively worked on by the agencies) should be removed from the agenda. However, the rulemaking agencies resisted removal of some of their less active items from the agenda because if the agencies decided to restart those rulemaking efforts, they would have to obtain new RINs and titles for the actions. New RINs and titles, they said, could cause confusion among regulated entities, since some of the rulemaking actions were already known by their previous RINs and titles. In an effort to accommodate these concerns, OIRA and RISC

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<sup>69</sup> Curtis W. Copeland, *Economic Analysis at Independent Regulatory Agencies*, p. 10, available at <http://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf>.

<sup>70</sup> That is also why the FCC has so few “completed actions,” even though it publishes an average of more than 100 final rules each year. Unlike in other agencies, where the issuance of a final rule constitutes the culmination of the rulemaking process, at the FCC a single rulemaking action may have more than one proposed rule/final rule sequence. In order for the public to follow a rulemaking action through a single RIN, rules are not identified as a “completed action” until it is clear that no further rulemaking will be done.

reportedly developed the “pending” category, allowing agencies to maintain RINS and titles in ROCIS while also keeping the number of items in the published agenda to a minimum.

The “pending” category is not mentioned in the “Introduction” to the Unified Agenda that is posted on the Reginfo.gov website (which describes each rulemaking stage and data element in the agenda),<sup>71</sup> recent OIRA data calls, the July 2014 ROCIS User Guide, or any other publicly available document.<sup>72</sup> However, the *Unified Agenda News* (a RISC newsletter of procedural highlights that is available only to agency staff who prepare their agencies’ agenda entries) has discussed the “pending” category. For example, the March 2012 edition of the *Unified Agenda News* (providing the schedule for the Spring 2012 edition of the agenda, which was never issued) contained an article entitled “New: ‘pending’ RIN Status” that stated:

There is now a new option available to agencies for the spring 2012 regulatory agenda. In certain cases, agencies are not working on a rulemaking in a given calendar year but do not want to lose the current RIN for that rulemaking. If your agency has rulemakings that fall into that category and you are considering removing such items from the spring 2012 Agenda, the agency does not need to lose the current RIN. Such rulemakings can be categorized as “Pending” and will be treated in virtually the same manner as “faturized” RINs, thus, removing the RIN from the current publication cycle. However, the current RIN will be available to the agency in subsequent publication cycles.<sup>73</sup>

Rulemaking agency staff were instructed to upload the list of rules that the agency wished to move to the “pending” RIN status into the electronic system used to input data into ROCIS, and RISC would “re-categorize those RINS and remove them from the printed Agenda.” Each RIN designated as “pending” was to “have the ROCIS print flag set to No, which will suppress its printing in the Spring 2012 edition of the Agenda or anywhere on reginfo.gov.”<sup>74</sup>

The agencies were also told to identify which RINS from the Fall 2011 “pending” list should be included as active items in the Spring 2012 (indicating that the “pending” list had actually started by at least the Fall 2011 edition of the agenda). According to the newsletter, entries would be moved from “pending” to an “active” category “with [OIRA] desk officer concurrence.”<sup>75</sup>

The August 2014 edition of the *Unified Agenda News* (containing the schedule for the Fall 2014 edition of the agenda) stated “we continue to offer a useful option, the “pending” RIN Status.”<sup>76</sup> It went on to say that “If you would like to take advantage of the “pending” RIN Status option, simply upload... a list of rules you wish to move to the “pending” category and notify your assigned analyst by e-mail. We will re-categorize those RINs and remove them from the current Agenda publication cycle.” Agencies were

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<sup>71</sup> See [http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201404/Preamble\\_8888.html](http://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201404/Preamble_8888.html).

<sup>72</sup> See [https://www.rocis.gov/rocis/jsp3/common/ROCIS\\_How\\_to\\_Guide\\_for\\_Agenda\\_Users\\_070214\\_v2.pdf](https://www.rocis.gov/rocis/jsp3/common/ROCIS_How_to_Guide_for_Agenda_Users_070214_v2.pdf).

<sup>73</sup> *Unified Agenda News*, March 2012, available from the author.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Unified Agenda News*, August 2014, available from the author.

told to identify entries from their previous “pending” list that they wanted to make active in the current cycle (“with desk officer concurrence”), and a complete list of “pending” regulatory actions “should be uploaded with the agency’s final corrections.” “Pending” actions “will then be placed on the Long-Term Actions stage of rulemaking and the print flag set to ‘no,’” meaning that it would not appear in the published Unified Agenda.

The Executive Director of RISC told the author of this report that although his office sometimes calls certain longstanding rulemaking actions to the attention of the sponsoring agencies, he said RISC does not tell the agencies which rulemaking category should be used (e.g., “long-term action” versus “pending”). He said the Unified Agenda reflects the agencies’ decisions regarding these rules, even though different agencies may be categorizing similar types of “old and cold” rulemaking actions differently. When an agency rulemaking action is placed in “pending,” he said it stays there until the agency asks that the action be reinstated to an active category (e.g., the “proposed rule stage” or the “final rule stage”), or moved to some other category.

It is not clear how many regulatory actions are currently in the “pending” category government-wide. (The author of this report requested that OIRA or RISC provide a listing of actions that were placed in the “pending” category, or data on the number of such actions, but that information was not provided as of the drafting of this report more than four months later.) Senior employees from one agency provided the author with a list of the agency’s “pending” regulatory actions from 2013. If all of these actions were added to the agency’s then-current agenda inventory, the number of entries would have increased by more than 30%. Employees in another agency indicated that inclusion of the agency’s “pending” list would have added about 15% more entries to the agenda. A senior employee in another agency said adding the regulatory actions in “pending” would increase the agency’s total number of agenda entries by about 50%. Together, just these three agencies had nearly 200 regulatory actions in “pending.”

## **A. Examining “Pending” RINs**

Examining the list of “pending” RINs from 2013 that one agency provided revealed that many of them have been there for years. Most commonly, the regulatory actions had moved into the “pending” category from the long-term action category, but many others had moved there from the proposed or final rule stage of the agenda. In some cases, the regulatory actions had been at the proposed, final, or long-term action stages for years before being moved into “pending,” but in other cases the actions had been at the proposed, final, or long-term action agenda stage for a few editions (and sometimes only one edition) before moving to “pending.” In a few cases, RINs appeared to have been placed on the agencies’ “pending” list without ever having previously appeared in the agenda. However, RISC indicated that these were likely “futurized” RINs, as RINs that have never appeared in an agenda and are not scheduled to appear in the current cycle are considered future RINs.

Most of the 2013 “pending” entries appeared to be still in “pending” as of November 2014. For example, several regulatory actions were placed in the “pending” category in late 2011, and the RINs have not reappeared in the agenda or in the *Federal Register* since then. However, a number of the RINs were later resurrected from the “pending” category and moved back into active rulemaking status. For example, one regulatory action was placed in the “pending” category in 2011, and after staying in “pending” for three agenda editions, it was then moved back into the final rule stage and has been there for two agenda editions (Spring and Fall 2014).

Other regulatory actions on the agency’s 2013 “pending” list were later discontinued, apparently while still in “pending” status. For example, one regulatory action that was placed in “pending” in late 2011 from the long-term action category did not reappear until the Fall 2014 agenda, when it was listed in the “completed action” category. (No explanation was provided as to why the rulemaking action was “completed.”) Another regulatory action that had also gone into “pending” in 2011 reappeared in the Fall 2013 agenda in the “completed action” category, with the agenda entry indicating that the action had been withdrawn as of a particular date.

## **B. Agency Reactions to “Pending”**

One senior agency employee told the author of this report that the “pending” category permits his agency (and, in the aggregate, the federal government as a whole) to keep the number of items in the published agenda down, while still allowing the agency to retain the RINs for rules that are less active. He said the “pending” category was “not necessarily a nefarious thing,” but rather an effort to have the agenda reflect the entries that are most likely to see some type of rulemaking action while accommodating the interests of the agencies and the public. A senior employee in another agency said that because the agencies’ projected dates of rule publication are often “wildly wrong,” the “pending” category allows agencies to avoid misleading the public about when rules are likely to be published. She said different presidential administrations have different approaches to the agenda, and the current administration wanted to give agencies this option.

However, several other senior agency staff expressed concerns about the creation and use of the “pending” category in ROCIS. One agency employee said the category was not transparent, and prevents the public from seeing what is really going on in an agency. Although he understood why the category was created, he said maintaining a list of “pending” rules that is not visible to the public “goes against good government.” He also said that the decline in the total number of agenda entries since 2012 (see **Table 2** above), and particularly the drop in the number of long-term action entries in recent years, is largely the result of this “pending” category, with regulatory actions that used to appear in the “long-term action” section of the agenda now only visible in ROCIS to RISC, OIRA,

and the rulemaking agencies themselves. He said that he was not sure why the published agenda could not be expanded to include a new section on “pending” rules.

Senior employees in another agency said their agency has no regulatory actions in the “pending” category because the staff considers the lack of transparency unacceptable. One of the employees said that by moving the agency’s regulatory actions into “pending,” the public would have the impression that the agency had decided to stop those actions, when in fact those actions were still under consideration by the agency. She said that she initially thought there would at least be a list of those rules that are “pending” on the Unified Agenda website (perhaps without the abstracts), but when RISC said the “pending” items would not be visible at all, her agency decided not to participate.

A senior employee in another agency said that although the “pending” category was created as a way to “streamline the long-term action category,” it has led to some confusion regarding whether certain rules are still being considered by the agency. For example, some rules can be in the active or long-term action sections of the agenda, and then just stop appearing in the agenda entirely because they have been moved into the “pending” section of ROCIS. She said it would be less confusing to the public to just put the “pending” rules back in the long-term action category, or to have a separate “pending” category in the agenda, rather than concealing them in an invisible “pending” section of ROCIS. Another senior agency employee said agencies with a large number or percentage of “pending” entries were not disclosing all of their rulemaking activities, and noted that the “pending” category is not mentioned in the agenda, the OIRA data call memoranda, or any other document available to the public.

## **V. Whether Proposed and Final Rules Are Published Without Prior Agenda Entries**

This section of the report focuses on the significant proposed and final rules that were published during the first six months of 2014 (i.e., January 1 through June 30) to determine whether they were preceded by “proposed rule stage” and “final rule stage” entries Unified Agenda. The first subsection discusses “Significant Proposed Rules” and the following subsection discusses “Significant Final Rules.” Within each of these two subsections, there is first a discussion of rules that were issued by Cabinet departments and independent agencies, and then a discussion of rules issued by independent regulatory agencies. (For another way to examine this issue, see Appendix B of this report.)

### **A. Significant Proposed Rules**

## 1. Cabinet Departments and Independent Agencies

According to the Reginfo.gov regulatory review database, Cabinet departments and independent agencies published a total of 88 proposed rules in the *Federal Register* between January 1, 2014, and June 30, 2014, that were “significant” regulatory actions, and/or were reviewed by OIRA prior to publication. Of those 88 significant proposed rules, 83 (94%) were preceded by a relevant “proposed rule stage” entry in the previous edition of the Unified Agenda (and sometimes other editions).<sup>77</sup> As **Table 7** below indicates, the five significant proposed rules that were published during this period without a prior “proposed rule stage” Unified Agenda entry were:

- A proposed rule published by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) within the Department of Justice (DOJ) on January 7, 2014 – less than six weeks after the publication of the Fall 2013 edition of the Unified Agenda.<sup>78</sup> The only agenda entry for this rule was a “final rule stage” entry in the Spring 2014 edition of the agenda, which was published nearly four months after the NPRM was published.<sup>79</sup>
- A proposed rule jointly issued on February 24, 2014, by the Department of Labor’s (DOL) Employee Benefits Administration (EBSA), the Internal Revenue Service (IRS), and the Centers for Medicare and Medicaid Services (CMS) within HHS.<sup>80</sup> Under the RIN numbers listed with the rule, CMS had two “final rule stage” entries in the Spring 2013 and Fall 2013 editions of the Unified Agenda that referenced a different NPRM that had been published in March 2013, and a “completed action” entry in the Spring 2014 edition of the agenda.<sup>81</sup> IRS published only a “final rule stage” entry for the rule in the Spring 2014 edition of the agenda. DOL/EBSA published a “proposed rule stage” entry in the Spring 2014 agenda even though the NPRM had been published nearly three months earlier and the comment period had already closed.
- A proposed rule jointly published under a single Federal Acquisition Regulation RIN (9000-AM69) on April 2, 2014, by DOD, GSA, and the National Aeronautics and Space Administration (NASA).<sup>82</sup> The only Unified Agenda entry for this rule

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<sup>77</sup> For this portion of the research, six editions of the Unified Agenda were examined: Spring 2011, Fall 2011, 2012, Spring 2013, Fall 2013, and Spring 2014. If a rule was published before the Spring 2014 edition of the agenda was published (May 23, 2014), any “proposed rule stage” entry in that agenda was not counted.

<sup>78</sup> U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms, and Explosives, “Amended Definition of ‘Adjudicated as a Mental Defective’ and ‘Committed to a Mental Institution’ (2010R-21P),” 79 FR 774, January 7, 2014.

<sup>79</sup> Unless otherwise indicated, the examples provided in this and other sections of this report reflect agenda editions relevant to that section, and may not reflect the most recent edition of the agenda. For example, because this section focuses on rules published during the first six months of 2014, it focuses on entries in the Fall 2013 and Spring 2014 agenda, and does not reflect agenda entries for those rules in the Fall 2014 edition of the agenda.

<sup>80</sup> U.S. Department of Labor, Employee Benefits Security Administration; Department of the Treasury, Internal Revenue Service; and Department of Health and Human Resources, Centers for Medicare and Medicaid Services, “Ninety-Day Waiting Period Limitation,” 79 FR 10320, February 24, 2014.

<sup>81</sup> The “completed action” referenced a final rule on the same issue that was published the same day. See 79 FR 10296.

<sup>82</sup> U.S. Department of Defense, General Services Administration, and the National Aeronautics and Space Administration, “Federal Acquisition Regulation; Extension of Limitations on Contractor Employee Personal Conflicts

(a “proposed rule stage” entry) was in the Spring 2014 edition, which was published more than six weeks after the NPRM appeared in the *Federal Register*. Nevertheless, that agenda entry indicated the proposed rule would not be published until July 2014.

- A DOL/EBSA proposed rule that was published on May 7, 2014 – less than three weeks before the Spring 2014 edition of the Unified Agenda was published.<sup>83</sup> Nevertheless, the Spring 2014 agenda contained a “proposed rule stage” entry that indicated the NPRM would not be published until July 2014.
- A CMS/HHS proposed rule that was published on May 23, 2014 – the same day that the Spring 2014 edition of the Unified Agenda was published.<sup>84</sup> No agenda entry was published for this rule at all.

**Table 7: Cabinet Departments and Independent Agencies: Significant Proposed Rules Published Without Prior “Proposed Rule Stage” Entry in the Unified Agenda: 1/1/2014 – 6/30/2014**

Department/ Agency	RIN	Date Published	Title	Recent UA History
DOJ/ATF	1140-AA47	01/07/14	Amended Definition of “Adjudicated as a Mental Defective” and “Committed to a Mental Institution”	“Final Rule Stage” entry in Spring 2014
DOL/EBSA, HHS/CMS, and IRS	1210-AB61, 0938-AR79, and 1545-BL97	02/24/14	Ninety-Day Waiting Period Limitation	“Proposed Rule Stage” entry in Spring 2014, after rule was published (EBSA); “Final Rule Stage” in Spring 2014 (IRS)
DOD, GSA, and NASA	9000-AM69	04/02/14	Federal Acquisition Regulation; Extension of Limitations on Contractor Employee Personal Conflicts of Interest	“Proposed Rule Stage” entry in Spring 2014 (after rule was published)
DOL/EBSA	1210-AB65	05/07/14	Health Care Continuation Coverage	“Proposed Rule Stage” entry in Spring 2014 (after rule was published)
HHS/CMS	0938-AS30	05/23/14	Medicare and Medicaid Programs; Modifications to the Medicare and Medicaid Electronic Health Record Incentive Programs for 2014; and Health Information Technology: Revisions to the Certified EHR Technology Definition	No mention

of Interest,” 79 FR 18503, April 2, 2014.

<sup>83</sup> U.S. Department of Labor, Employee Benefits Security Administration, “Health Care Continuation Coverage,” 79 FR 26192, May 7, 2014.

<sup>84</sup> U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, “Medicare and Medicaid Programs; Modifications to the Medicare and Medicaid Electronic Health Record Incentive Programs for 2014; and Health Information Technology: Revisions to the Certified EHR Technology Definition,” 79 FR 29732, May 23, 2014.

Source: Unified Agenda at [Reginfo.gov](http://Reginfo.gov).

Note: Checks were done through the Spring 2014 edition of the Unified Agenda

Four other significant proposed rules during this period were published less than two months after the only prior “proposed rule stage” Unified Agenda entry was published, indicating that the public and other parties relying on the agenda for information would have had little prior notice that the proposed rule was about to be issued. Those four significant proposed rules were:

- An OPM proposed rule that was published on January 6, 2014 – only 41 days after the only “proposed rule stage” entry was published in the Fall 2013 edition of the Unified Agenda.<sup>85</sup>
- A DOL Wage and Hour Division proposed rule that was published on June 17, 2014 – only 25 days after the only “proposed rule stage” entry was published in the Spring 2014 edition of the Unified Agenda.<sup>86</sup>
- A proposed rule issued by the Forest Service within the Department of Agriculture (USDA) that was published on June 18, 2014 – only 26 days after the only “proposed rule stage” entry was published in the Spring 2014 edition of the Unified Agenda.<sup>87</sup>
- A GSA proposed rule that was published on June 26, 2014 – only 34 days after the only “proposed rule stage” entry was published in the Spring 2014 edition of the Unified Agenda.<sup>88</sup>

Viewed from another perspective, however, for 79 (90%) of the 88 significant proposed rules published during the first six months of 2014, the Unified Agenda provided the public with at least two months prior notice that the proposed rules were about to be issued. Of these 79 proposed rules:

- 19 were preceded by only one prior Unified Agenda “proposed rule stage” entry, and that entry was published more than two months before the NPRM was published;
- 19 were preceded by two prior Unified Agenda “proposed rule stage” entries;
- 23 were preceded by three prior “proposed rule stage” agenda entries;
- 9 were preceded by four prior “proposed rule stage” agenda entries; and
- 9 were preceded by five or more prior “proposed rule stage” agenda entries.<sup>89</sup>

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<sup>85</sup> Office of Personnel Management, “Administrative Wage Garnishment,” 79 FR 609, January 6, 2014.

<sup>86</sup> U.S. Department of Labor, Wage and Hour Division, “Establishing a Minimum Wage for Contractors,” 79 FR 34568, June 17, 2014.

<sup>87</sup> U.S. Department of Agriculture, Forest Service, “Use by Over-Snow Vehicles (Travel Management Rule),” 79 FR 34678, June 18, 2014.

<sup>88</sup> General Services Administration, “Federal Travel Regulation (FTR); Terms and Definitions for “Marriage,” “Spouse,” and “Domestic Partnership,”” 79 FR 36279, June 26, 2014.

<sup>89</sup> As discussed in more detail later in this report, identifying a proposed rule as forthcoming within the following 12 months in three or more editions of the agenda means that the agenda was not accurate at least once.

## 2. Independent Regulatory Agencies

Reginfo.gov does not permit identification of significant rules issued by independent regulatory agencies (because their rules are not covered by the OIRA review requirements in Executive Order 12866). Therefore, as discussed in the “Objectives, Scope, and Methodology” section of this report, the author reviewed all proposed rules published by seven independent regulatory agencies between January 1, 2014, and June 30, 2014, and identified the proposed rules that appeared to be significant in nature (e.g., excluding those that were simply reopening a comment period, correcting or supplementing an earlier proposed rule, or were only a few pages in the *Federal Register*). A total of 22 potentially significant proposed rules published by these agencies during the first six-months of 2014 were identified in this manner.

Overall, the independent regulatory agencies were much less likely to publish “proposed rule stage” entries in the Unified Agenda before publishing their significant proposed rules. Only seven (32%) of the 22 proposed rules examined had any such prior agenda entry, and three of the seven rules were preceded by only one such entry (all of which were published at least two months prior to the publication of the proposed rule).<sup>90</sup> However, the independent regulatory agencies differed substantially in this regard. All three of the SEC’s significant proposed rules were preceded by a relevant “proposed rule stage” agenda entry, and two of the four proposed rules that CFPB issued on its own were preceded by a “proposed rule stage” entry. On the other hand, only one of the five significant proposed rules issued by NRC during this period had a prior agenda entry, and none of the eight proposed rules published on their own by the FCC, FDIC, Federal Reserve System, and CFTC had a prior “proposed rule stage” entry. See **Table 8** below for a list of the proposed rules that were published without a corresponding “proposed rule stage” entry in the preceding agenda.

**Table 8: Independent Regulatory Agencies: Significant Proposed Rules Published Without Prior “Proposed Rule Stage” Entry in the Unified Agenda: 1/1/2014 – 6/30/2014**

Agency	RIN or Other	Date Published	Title	Recent UA History
CFTC	3038-AE19	06/02/14	Exclusion of Utility Operations-Related Swaps With Utility Special Entities From De Minimis Threshold for Swaps With Special Entities	No entries found
NRC	3150-AH42	03/24/14	Performance-Based Emergency Core Cooling Systems Cladding Acceptance Criteria	“Long-term action” entries from 2011 through 2013; “proposed rule” entry in Spring 2014 (after

<sup>90</sup> One of the remaining four rules had two prior “proposed rule stage” Unified Agenda entries, and three rules had three such entries.

				rule was published)
NRC	3150-AJ32	04/14/14	Revision of Fee Schedules; Fee Recovery for Fiscal Year 2014	“Proposed rule” entry in Spring 2014 (after rule was published)
NRC	3150-AJ31	04/15/14	List of Approved Spent Fuel Storage Casks: Transnuclear, Inc. Standardized Advanced NUHOMS® Horizontal Modular Storage System; Amendment No. 3	“Proposed rule” entry in Spring 2014 (after rule was published)
NRC	3150-AI85	03/24/14	ESBWR Design Certification	NPRM in 2011; “Final rule” and “Long-term action” entries until “Proposed rule” entry in Spring 2014, after rule was published
CFPB	3170-AA39	05/13/14	Amendment to the Annual Privacy Notice Requirement Under the Gramm-Leach-Bliley Act (Regulation P)	“Prerule” entries in Spring and Fall 2013; “Proposed rule” entry in Spring 2014 (after rule was published)
CFPB	3170-AA43	05/06/14	Amendments to the 2013 Mortgage Rules Under the Truth in Lending Act (Regulation Z)	“Prerule” entry in Fall 2013; “Proposed rule” entry in Spring 2014 (after rule was published)
FDIC + Office of the Comptroller of the Currency (OCC)/Treas + FRS	3064-AE12 + 1557-AD81 + 7100-AD16	05/01/14	Regulatory Capital Rules: Regulatory Capital, Proposed Revisions to the Supplementary Leverage Ratio	“Proposed rule” entry in Spring 2014 (OCC but not other agencies), but after rule was published
FDIC	3064-AE07	04/21/14	Securities of State Savings Associations and Securities of Nonmember Insured Banks	“Proposed rule” entry in Spring 2014 (after rule was published)
FCC	FCC 13-157	01/15/14	Expanding Access to Mobile Wireless Services Onboard Aircraft	No entries found
FCC	FCC 13-162	01/24/14	Sports Blackout Rules	No entries found
FCC	FCC 13-147	02/19/14	Proposal To Enable Operation of a Terrestrial Broadband Network in Certain Mobile Satellite Service Spectrum	No entries found; “Long-term” entries in several previous editions may be related
FCC	FCC 14-6	03/05/14	Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications; Framework for Next Generation 911 Deployment	No entries found; “Long-term” entries in several previous editions may be related
FRS	7100-AE09	01/22/14	Financial Market Utilities	“Proposed rule” entry in Spring 2014 (four months after rule was published); indicates “Board expects

				further action”
FRS	2014-10956	05/15/14	Concentration Limits on Large Financial Companies	No entries found

Source: Unified Agenda at Reginfo.gov.

**a. *Jointly Issued Rules***

Jointly issued proposed rules were inconsistently reflected in the agenda. For example, one proposed rule that was jointly issued by FDIC, FRS, OCC, CFPB, and the Federal Housing Finance Agency (FHFS) had no prior “proposed rule stage” entry when searched under the FDIC or Federal Reserve System RINs for the rule, but searching under the RINS for the OCC, CFPB, and FHFA, revealed several such entries.<sup>91</sup> Similarly, in the “Regulatory Capital Rules” NPRM in the above table, a Unified Agenda entry was found only for one of the three agencies issuing the rule (OCC) – which was published in the Spring 2014 edition, after the rule had already been published. The other two agencies (FDIC and the Federal Reserve System) had no agenda entries for the rule at all.

**b. *Rules With Other Types of Prior Agenda Entries***

As indicated in **Table 8** above, several of the independent regulatory agencies’ significant proposed rules with no prior “proposed rule stage” entry in the last several editions of the Unified Agenda did have some type of earlier entries. For example:

- An NRC proposed rule published on March 24, 2014 (79 FR 16106, RIN 3150-AH42) had related “proposed rule stage” entries in the Fall 2009, Spring 2010, and Fall 2010 editions of the agenda, “long-term action” entries in the next five editions of the agenda (Spring 2011 through Fall 2013), and then a “proposed rule stage” entry in the Spring 2014 edition – after the rule had been published.
- Another NRC proposed rule published the same day (79 FR 16549, RIN 3150-AI85) had (1) a “proposed rule stage” entry in the Spring 2011 edition of the agenda (referencing the comment period for a March 2011 proposed rule under the same RIN), (2) a “final rule stage” entry for the Fall 2011 edition, (3) “long-term action” entries in the 2012 and Spring 2012 editions, (4) a “final rule stage” entry in the Fall 2013 edition, and (5) a “proposed rule stage” entry in the Spring 2014 edition (reflecting the comment period for the already published rule). Therefore, there was no “proposed rule stage” entry in the agenda that immediately preceded the publication of the March 2014 proposed rule.

<sup>91</sup> The rule was “Minimum Requirements for Appraisal Management Companies,” 79 FR 19521, April 9, 2014. Under the FDIC RIN (3064-AE10), only one “proposed rule stage” entry was available in the Spring 2014 edition of the agenda, published after the rule was issued. However, under the OCC RIN (1557-AD64), “proposed rule stage” entries were in the Spring and Fall 2013 editions. Therefore, this rule was considered to have a prior agenda entry, and was not included in the preceding table.

- An FCC proposed rule published March 5, 2014 (FCC 14-6, 79 FR 12442) was preceded by “long-term action” entries in all editions of the agenda from Spring 2011 through Spring 2014 (even though the proposed rule had been published more than two months before the Spring 2014 edition was published).

## B. Significant Final Rules

### 1. Cabinet Departments and Independent Agencies

The regulatory review database at [Reginfo.gov](http://Reginfo.gov) indicates that between January 1, 2014, and June 30, 2014, Cabinet departments and independent agencies published a total of 55 final rules in the *Federal Register* that were considered “significant” regulatory actions and/or were reviewed by OIRA prior to publication. Of those 55 significant final rules, 41 (75%) were immediately preceded by a “final rule stage” entry in the Unified Agenda.<sup>92</sup> **Table 9** below shows the 14 final rules that were published during this period without a prior “final rule stage” entry. As the table indicates, 10 of the 14 rules were issued by two agencies: CMS/HHS and the Office of Energy Efficiency and Renewable Energy (EE) within the Department of Energy (DOE). The table also shows that the issuing agencies characterized 11 of the 14 rules as “economically significant” when they were published.

**Table 9: Cabinet Departments and Independent Agencies: Significant Final Rules Published Without Prior “Final Rule Stage” Entry in the Unified Agenda: 1/1/2014 – 6/30/2014**

Department/ Agency	RIN	Date of Publication	Title	Priority at Time of Publication	Recent UA History
USDA/CCC	0560-AI21	04/14/14	Supplemental Agricultural Disaster Assistance Programs, Payment Limitations, and Payment Eligibility	Economically Significant	No entries found
DOC/BIS	0694-AG04	03/26/14	Implementation of the Understandings Reached at the June 2013 Australia Group (AG) Plenary Meeting and the December 2012 AG Intersessional Decisions	Other Significant	“Completed action” entry in Spring 2014
HHS/CMS	0938-AR37	05/23/14	Medicare Program; Contract Year 2015 Policy and Technical Changes to the Medicare Advantage	Economically Significant	“Proposed” entries in 2012 and 2013; “Completed

<sup>92</sup> For this portion of the research, six editions of the Unified Agenda were examined: Spring 2011, Fall 2011, 2012, Spring 2013, Fall 2013, and Spring 2014. If a rule was published before the Spring 2014 edition of the agenda was published (May 23, 2014), any “final rule stage” entry in that agenda was not counted.

			and the Medicare Prescription Drug Benefit Programs		action” entry in Spring 2014
HHS/CMS	0938-AR49	05/12/14	Medicare and Medicaid Programs; Regulatory Provisions To Promote Program Efficiency, Transparency, and Burden Reduction; Part II	Economically Significant	“Proposed” entry in 2012; “Long-term” entries in 2013; “Completed action” entry in Spring 2014
HHS/CMS	0938-AR62	05/02/14	Medicare Program; Prospective Payment System for Federally Qualified Health Centers; Changes to Contracting Policies for Rural Health Clinics; and Changes to Clinical Laboratory Improvement Amendments of 1988 Enforcement Actions for Proficiency Testing Referral	Economically Significant	“Proposed” entries in 2012 and 2013; “Completed action” entry in Spring 2014
HHS/CMS	0938-AR89	03/11/14	Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015	Economically Significant	“Proposed” entries in 2013; “Completed action” entry in Spring 2014
HHS/CMS	0938-AR93	03/12/14	Basic Health Program: State Administration of Basic Health Programs; Eligibility and Enrollment in Standard Health Plans....	Economically Significant	“Proposed” entries in 2013; “Completed action” entry in Spring 2014
HHS/CMS	0938-AS02	05/27/14	Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond	Economically Significant	“Proposed” entry in Fall 2013; “Completed action” entry in Spring 2014
DOL/EBSA IRS HHS	1210-AB61 1545-BL97 0938-AR77	06/25/14	Ninety-Day Waiting Period Limitation (Affordable Care Act)	Other Significant	“Proposed” entry in Spring 2014 (NPRM issued 02/24/14)
ED/OS	1894-AA05	03/27/14	Final Priority-Promise Zones	Other Significant	“Proposed” entries in 2013; “Completed action” entry in Spring 2014
DOE/EE	1904-AB86	06/03/14	Energy Conservation Program: Energy Conservation Standards for Walk-In Coolers and Freezers	Economically Significant	“Proposed” entries in 2011, 2012, and 2013; “Completed action” entry in Spring 2014
DOE/EE	1904-AC00	02/10/14	Energy Conservation Program: Energy	Economically Significant	“Proposed” entries in 2011

			Conservation Standards for Metal Halide Lamp Fixtures		and 2013; “Long-term” entry in 2012; “Completed action” entry in Spring 2014
DOE/EE	1904-AC19	03/28/14	Energy Conservation Program: Energy Conservation Standards for Commercial Refrigeration Equipment	Economically Significant	“Proposed” entries in 2012, and 2013; “Completed action” entry in Spring 2014
DOE/EE	1904-AC28	05/29/14	Energy Conservation Program: Energy Conservation Standards for Commercial and Industrial Electric Motors	Economically Significant	“Proposed” entries in 2011, 2012, and 2013; “Completed action” entry in Spring 2014

Source: Unified Agenda at Reginfo.gov and the Federal Register.

Four other significant final rules were published less than two months after the only prior “final rule stage” Unified Agenda entry was published (and two of those were published within two weeks after the agenda entry). Therefore, those relying on the Unified Agenda would have had little prior notice that the final rules were about to be issued. The four final rules were:

- A Department of Commerce/Bureau of Industry and Security (DOC/BIS) rule on “Revisions to the Export Administration Regulations Based on the 2013 Missile Technology Control Regime Plenary Agreements,” RIN 0694-AG02. The rule was published on May 27, 2014 – only four days after the only “final rule stage” (or any stage) Unified Agenda entry was published in the Spring 2014 edition of the agenda.
- A State Department rule on “Amendment to the International Traffic in Arms Regulations: Third Rule Implementing Export Control Reform,” RIN 1400-AD46. The rule was published on January 2, 2014 – only 37 days after the only “final rule stage” entry for the rule (and the only prior agenda entry) was published in the Fall 2013 edition of the agenda.
- A Department of Homeland Security (DHS)/Transportation Security Administration (TSA) rule on “Adjustment of Passenger Civil Aviation Security Service Fee,” RIN 1652-AA68. The rule was published on June 20, 2014 – less than one month after the only “Final Rule Stage” entry (and the only entry of any kind) was published in the Spring 2014 agenda.
- A Department of Veterans Affairs (VA) rule on “Burial Benefits,” RIN 2900-AO82. The rule was published on June 6, 2014 – two weeks after the only “Final Rule Stage” entry was published in the Spring 2014 agenda.

In addition:

- The Fish and Wildlife Service within DOI published a final rule on “Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Jaguar” (RIN 1018-AX13) on March 5, 2014. The previous edition of the Unified Agenda (Fall 2013) identified the rule as a “long-term action,” not an upcoming final rule. (There was, however, a “final rule stage” entry for the rule in the Spring 2013 edition of the agenda.)
- The National Highway Traffic Safety Administration (NHTSA) within the Department of Transportation published a final rule on rear view cameras on April 7, 2014 (RIN 2127-AK43). In both the Spring 2013 and Fall 2013 editions of the agenda, the rule was in the “long-term action” section of the agenda. (The rule had been in the “final rule stage” section in 2011 and 2012.)

Therefore, in 35 (64%) of the 55 significant final rules published in the first six months of 2014 by these Cabinet departments and agencies, the Unified Agenda provided the public with at least two months prior notice that a final rule was about to be issued (and was not contradicted by a subsequent agenda entry). Viewed from another perspective, however, 20 (36%) of the 55 significant final rules published by Cabinet departments and independent agencies during this period were issued without at least two months clear notice in the agenda.

Of the remaining significant final rules published during this period:

- five final rules were preceded by only one prior “final rule stage” agenda entry, and that entry was published more than two months before the final rule was published;
- nine rules were preceded by two prior “final rule stage” entries;
- 13 rules were preceded by three prior “final rule stage” agenda entries;
- two rules were preceded by four prior “final rule stage” agenda entries; and
- seven rules were preceded by five or more prior “final rule stage” agenda entries.<sup>93</sup>

## 2. Independent Regulatory Agencies

The author reviewed all final rules published by the SEC, CFTC, NRC, CFPB, FDIC, FCC and the Federal Reserve System between January 1 and June 30, 2014, and identified a total of 20 potentially significant final rules. Of the 20 final rules, only seven (35%) had “final rule stage” entries in the preceding Unified Agenda. **Table 10** below identifies the 13 rules that did not have a “final rule stage” entry in the preceding agenda.

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<sup>93</sup> As discussed in more detail later in this report, identifying a final rule as forthcoming within the following 12 months in three or more editions of the agenda means that the public was misinformed at least once.

**Table 10: Independent Regulatory Agencies: Significant Final Rules Published Without Prior “Final Rule Stage” Entry in the Unified Agenda: 1/1/2014 – 6/30/2014**

Agency	RIN or Other	Date of Publication	Title	Recent UA History
Treas/OCC + CFTC +FDIC +SEC + Federal Reserve System	1557-AD79 + 3038-AE13 + 3064-AE11 + 3235-AL52 + 7100-AE11	01/31/14  (Interim final rule)	Treatment of Certain Collateralized Debt Obligations Backed Primarily by Trust Preferred Securities With Regard to Prohibitions and Restrictions on Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds	Only entries were in Spring 2014 agenda (after rule was published); agencies used different categories (e.g., long-term action, final rule stage, completed action)
Treas/OCC + FDIC + Federal Reserve System	1557-AD69 + 3064-AE01 + 7100-AD99	05/01/14	Regulatory Capital Rules: Regulatory Capital, Enhanced Supplementary Leverage Ratio Standards for Certain Bank Holding Companies and Their Subsidiary Insured Depository Institutions	Only entries were in Spring 2014 edition (after rule published); entries were in final rule stage (OCC), completed action (FDIC), and proposed rule stage (Federal Reserve)
NRC	3150-AJ32	06/30/14	Revision of Fee Schedules; Fee Recovery for Fiscal Year 2014	Only entry was in Spring 2014; proposed rule stage (NPRM published 04/14/14)
NRC	3150-AJ31	04/15/14  (Direct final rule)	List of Approved Spent Fuel Storage Casks: Transnuclear, Inc. Standardized Advanced NUHOMS® Horizontal Modular Storage System; Amendment No. 3	Only entry was in Spring 2014; proposed rule stage, even though final rule issued more than a month earlier
NRC	3150-AJ28	03/10/14  (Direct final rule)	List of Approved Spent Fuel Storage Casks: Transnuclear, Inc. Standardized NUHOMS® Cask System	Only entry was in Spring 2014; final rule stage, even though final rule was issued more than two months earlier
Federal Reserve System	7100-AE01 and AE02	03/11/14	Application of the Revised Capital Framework to the Capital Plan and Stress Test Rules	Only entry was in Spring 2014; completed action
FDIC	3064-AE05	04/14/14	Restrictions on Sales of Assets of a Covered Financial Company by the Federal Deposit Insurance Corporation	Proposed rule stage in Fall 2013; completed action in Spring 2014
FCC	FCC 13-137, 2013-28974	01/06/14	Consolidated Service Rules for the 758-769 and 788-799 MHz Bands	No entries found
FCC	FCC 13-158, 2014-00958	01/17/14	Improving 9-1-1 Reliability; Reliability and Continuity of Communications Networks, Including Broadband Technologies	Long-term action entries in Spring and Fall 2013, and Spring 2014 (which also showed the rule had been published)
FCC	FCC 14-5, 2014-04313	02/28/14	Technology Transitions; Connect America Fund	No entries found

FCC	FCC 14-12, 2014-06754	03/31/14	Closed Captioning of Video Programming; Telecommunications for the Deaf and Hard of Hearing; Petition for Rulemaking	Only Long-term action entry in Spring 2014
FCC	FCC 14-28, 2014-10874	05/20/14	2014 Quadrennial Regulatory Review	No entries found
FCC	FCC 14-31, 2014-11235	06/04	Commercial Operations in the 1695-1710 MHz, 1755-1780 MHz, and 2155-2180 MHz Bands	No entries found

Source: Unified Agenda at Reginfo.gov.

Of the seven rules that had prior “final rule stage” Unified Agenda entries, two rules had one such entry, three rules had three such entries, one rule had four such entries, and one rule had five such entries. Of the two rules with only one prior “final rule stage” entry, one was posted less than two months before the rule was published.<sup>94</sup> Therefore, only six of the 20 significant final rules (30%) had a “final rule stage” agenda entry posted more than two months before the final rules were published.

**a. Jointly Issued Rules Were Inconsistently Characterized**

When a final rule issued jointly by several agencies was preceded by a “final rule stage” entry in the Unified Agenda, the agencies’ agenda entries were sometimes not consistent in their characterizations of the upcoming rule. For example, in a January 31, 2014, final rule issued by Treasury/OCC, FDIC, SEC, and the Federal Reserve System,<sup>95</sup> the four agencies differed substantially in terms of whether they provided “final rule stage” entries in the preceding agendas, and in the content of those entries. (See **Table 11** below.)

**Table 11: Agencies’ Agenda Entries Were Inconsistent for One Jointly Issued Rule**

Agenda Edition/ Elements	Treasury/OCC	FDIC	SEC	Federal Reserve System
2012				
Stage of Rulemaking	Final	Final	No Entry	Final

<sup>94</sup> The Federal Reserve System published its final rule on “Prohibition Against Federal Assistance to Swaps Entities (Regulation KK)” (79 FR 340, RIN 7100-AD96) on January 3, 2014 – less than two months after the only “final rule stage” entry for the rule appeared in the Fall 2013 edition of the Unified Agenda (published on November 26, 2013). In that entry, the Federal Reserve only said there would be “further action,” not that a final rule would be published.

<sup>95</sup> U.S. Department of the Treasury, Office of the Comptroller of the Currency; Federal Reserve System; Federal Deposit Insurance Corporation; and Security and Exchange Commission, “Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds,” 79 FR 5535, January 31, 2014.

Major	Undetermined	No	No Entry	No
Priority	Other Significant	Substantive	No Entry	Substantive
RFA Analysis	No	No	No entry	Undetermined
Spring 2013				
Stage of Rulemaking	Final	Final	Long-term Action	Final
Major	Undetermined	No	Undetermined	No
Priority	Other Significant	Substantive	Substantive	Substantive
RFA Analysis	Undetermined	No	Undetermined	Undetermined
Fall 2013				
Stage of Rulemaking	Final	Final	Long-term Action	Final
Major	Undetermined	No	Undetermined	No
Priority	Other Significant	Substantive	Substantive	Substantive
RFA Analysis	Undetermined	No	Undetermined	No
Spring 2014				
Stage of Rulemaking	Completed	Completed	Completed	Completed
Major	Yes	Yes	Yes	No
Priority	Economically Significant	Substantive	Substantive	Substantive
RFA Analysis	No	No	No	No

Source: Unified Agenda at [Reginfo.gov](http://Reginfo.gov). The rule at issue was U.S. Department of the Treasury, Office of the Comptroller of the Currency; Federal Reserve System; Federal Deposit Insurance Corporation; and Security and Exchange Commission, “Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds,” 79 FR 5535, January 31, 2014. The agencies’ RINs used for the rule and in [Reginfo.gov](http://Reginfo.gov) were 1557-AD44 (Treas/OCC), 3064-AD85 (FDIC), 3235-AL07 (SEC), and 7100-AD82 (FRS).

Therefore, the SEC never had a “final rule stage” entry in the Unified Agenda for the rule. The other three agencies did, but they differed considerably regarding the content of the rule. Even months after the rule was published, the agencies’ characterizations of the “completed action” varied, with all but the Federal Reserve System characterizing the rule as “major.” There were also apparent inconsistencies *within* individual agencies’ descriptions of the rule. For example, even though two of the agencies (FDIC and SEC) said the rule was “major,” they also said the rule was only “substantive” in terms of its priority under EO 12866. (It is not clear how a rule can simultaneously be “major” under the Congressional Review Act and only “substantive” in terms of its priority.)

In another final rule jointly issued by OCC, FDIC, and the Federal Reserve System on May 1, 2014 (for which there were no prior “final rule stage” Unified Agenda entries):<sup>96</sup>

<sup>96</sup> U.S. Department of the Treasury, Office of the Comptroller of the Currency; Federal Reserve System; and the

- In the Fall 2013 agenda, all three agencies had “proposed rule stage” entries for the rule (even though the NPRM had been published in August 2013, with the comment period ending in October 2013 – two months before the Fall 2013 agenda was published).
- In the Spring 2014 agenda, OCC had the rule in the “final rule stage” (even though the final rule had been published three weeks earlier); FDIC had the rule as a “completed action;” and the Federal Reserve System still had the rule in the “proposed rule stage.” Both OCC and FDIC showed the rule as published (with a link to the final rule), but the Federal Reserve System indicated that the Board expected to take “further action” in June 2014. FDIC and the Federal Reserve System indicated that the rule would not be “major,” but OCC said it was “undetermined.” OCC and FDIC said the rule would not require an RFA analysis, but the Federal Reserve System indicated that the rule would require an analysis.

### C. Summary

As **Table 12** and **Figure 2** below indicate, for significant rules published during the first half of 2014, the Unified Agenda was a reasonably good predictor for the *proposed* rules issued by Cabinet departments and independent agencies, with 79 (90%) of the 88 proposed rules being preceded by a “proposed rule stage” entry in the agenda at least two months prior to the rules being issued. However, the Unified Agenda was a somewhat less effective predictor of significant *final* rules issued by those same agencies, with only 35 (64%) of the 55 final rules preceded by a “final rule stage” agenda entry at least two months prior to the publication of the rule, and that was not contradicted by a subsequent agenda entry.

**Table 12: Number of Significant Proposed and Final Rules Preceded by Relevant Agenda Entry Before Publication by Agency Type: 1/1/2014 – 6/30/2014**

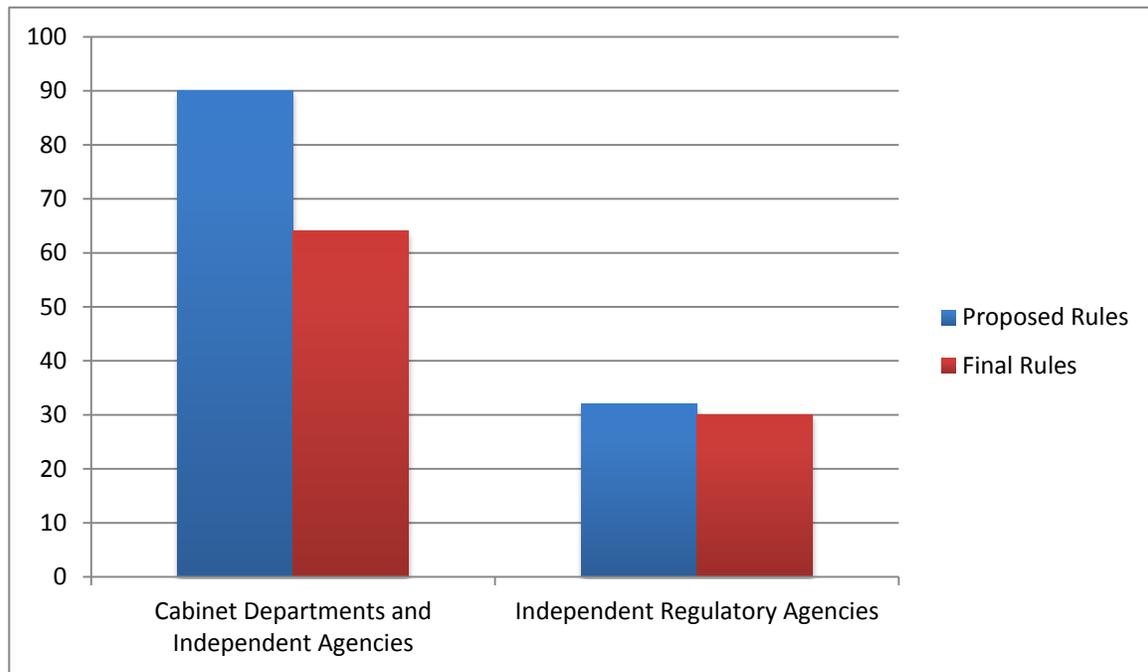
	Significant Proposed Rules	Significant Final Rules
<b>Cabinet Departments and Independent Agencies</b>		
Total rules	88	55
Rules with prior proposed/ final rule stage agenda entry	83	41
Rules with prior proposed/ final rule stage agenda entry at least two months before rule published	79	35

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Federal Deposit Insurance Corporation, “Regulatory Capital Rules: Regulatory Capital, Enhanced Supplementary Leverage Ratio Standards for Certain Bank Holding Companies and Their Subsidiary Insured Depository Institutions,” 79 FR 24528, May 1, 2014.

Independent Regulatory Agencies		
Total rules	22	20
Rules with prior proposed/ final rule stage agenda entry	7	7
Rules with prior proposed/ final rule stage agenda entry at least two months before rule published	7	6

**Figure 2: Percentage of Significant Proposed and Final Rules Preceded by Relevant Agenda Entry At Least Two Months Before Publication by Agency Type**



Note: Significant proposed and final rules published January 1, 2014 through June 30, 2014.

Independent regulatory agencies as a whole were much less likely to publish relevant Unified Agenda entries prior to the publication of what appeared to be their “significant” proposed and final rules. Only seven (32%) of these agencies’ 22 significant proposed rules had a prior “proposed rule stage” entry in the Unified Agenda at least two months prior to publication, and only six (30%) of their 20 significant final rules had such a prior “final rule stage” entry. However, the independent regulatory agencies differed substantially in this regard. The SEC had relevant agenda entries before publishing all five of its proposed and final rules. At the other extreme, the FCC did not have prior agenda entries before any of its 10 proposed and final rules were published.<sup>97</sup> As noted

<sup>97</sup> Because the FCC issues so many proposed and final rules (and accounted for nearly a quarter of all significant rules published by independent regulatory agencies during this period), the agency’s practice of not using the agenda to identify upcoming proposed and final rules affected the results for the independent regulatory agencies as a whole. Of the 42 significant proposed and final rules published by all independent regulatory agencies during this period, 13 (31%) had a corresponding agenda entry in the previous edition of the agenda. After excluding the 10 FCC rules from this analysis, the percentage of rules with a prior agenda entry grows to 41% (13 of 32).

earlier in this report, the FCC does not use the Unified Agenda to alert the public to forthcoming rules; it has published only two “proposed rule stage” entries in the Unified Agenda since 2006 (which an FCC senior employee described as a “mistake”), and has not published a “final rule stage” entry since 1999.

When several agencies jointly issued proposed or final rules, the Unified Agenda was often inconsistent. In some cases, one of the issuing agencies published relevant entries in one or more editions of the agenda, while the other issuing agencies published no such entries. Even when the agencies jointly issuing a rule all had agenda entries about the rule, the agencies frequently differed in their characterizations of the rule – even after the rule had been issued. The agencies’ entries were sometimes in completely different sections of the agenda (e.g., “proposed rule stage,” “final rule stage,” or “completed action”), and differently characterized the rule in terms of priority (e.g., major versus non-major, or “economically significant” versus “other significant”).

#### **D. Multiple Prior Entries as “False Positives”**

Although publishing proposed and final rule stage entries in the Unified Agenda before publishing proposed and final rules is generally a good thing, having too many of those entries about a particular rule over a long period of time can be misleading. Eighteen of the 88 significant proposed rules published by Cabinet departments and independent agencies during the first half of 2014 were preceded by four or more “proposed rule stage” agenda entries, and nine had five or more prior entries. Nine of the 55 significant final rules published by those agencies during the first half of 2014 were preceded by four or more “final rule stage” agenda entries, and seven were preceded by five or more such entries. Therefore, the public was repeatedly told that a proposed or final rule would be coming within the next 12 months, but those notifications were often incorrect – i.e., “false positives” of upcoming rulemaking activity. In these cases, as Sally Katzen testified in October 2013, “information becomes misinformation,” and the Unified Agenda becomes less accurate and may be perceived as less credible. The following major section of this report (“Whether Proposed and Final Rule Agenda Entries Are Followed by Rulemaking”) explores this issue in more depth.

#### **E. Why Significant Proposed and Final Rules Were Not Predicted by the Unified Agenda**

The senior agency employees interviewed for this report suggested a variety of reasons why proposed and final rules are sometimes published without a prior “proposed rule stage” or “final rule stage” entry in the Unified Agenda. Several of the employees said rules are sometimes developed, reviewed, and published more quickly than expected, and indicated that non-significant rules are even more likely to be developed and issued quickly than significant rules. They also said that some new rules are required to be

published after one edition of the agenda has been issued, but before the next edition is posted (e.g., in response to national emergencies like Hurricane Katrina, or because of statutory deadlines, presidential actions, or court decisions).

One senior employee said that her agency put one agenda entry in the “long-term action” section of the agenda when it first started to develop a rule because it wanted to make sure the public was aware that a rule was coming, even though it was not clear when the rule would actually be published. However, a natural disaster and other events accelerated the rule development process, particularly after prompting from the agency’s political leadership. She said by the time it was clear that the proposed rule was ready to be published, it was too late for the agency to put a “proposed rule stage” entry in the Fall 2013 agenda, and the agency issued the proposed rule before the Spring 2014 agenda was published.

In another rule issued by the same agency, the data needed for the proposed rule was not available until late in the rulemaking process. By the time the data were available, the agency had to publish the rule quickly in order to meet statutory requirements for when the final rule had to be issued. Although they agreed that they could have put a generic “proposed rule stage” entry in the Fall 2013 agenda, they said the entry would not have had the level of detail needed for the public to understand the substance of the rule.

Some of the senior agency staff said that even when there is no prior agenda entry, regulated entities and other interested parties often know that a proposed or final rule is about to be issued. They also pointed out that these parties can see that a rule is about to be issued by monitoring the OIRA review process on [Reginfo.gov](http://Reginfo.gov), and seeing that OIRA has begun or concluded review of rule (because the “Regulatory Review” database is updated daily).

## 1. Reasons from Rulemaking Record

Examination of the rulemaking record sometimes revealed why certain proposed and final rules were not preceded by associated Unified Agenda entries. The reasons included the following:

- Executive orders that required agencies to issue implementing regulations within a matter of months.<sup>98</sup>

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<sup>98</sup> For example, DOL’s Wage and Hour Division published a proposed rule in June 2014, but did not post any entries in the Unified Agenda until the Spring 2014 edition, which was issued only a few weeks before the proposed rule was published. (See U.S. Department of Labor, Wage and Hour Division, “Establishing a Minimum Wage for Contractors,” 79 FR 34568, June 17, 2014.) The proposed rule implemented Executive Order 13658, which was issued February 12, 2014, and which raised the hourly minimum wage paid by federal contractors to workers performing on covered federal contracts to: \$10.10 per hour, beginning January 1, 2015; and beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor. The executive order directed the Secretary of Labor to issue regulations implementing the order by October 1, 2014. Because the executive order was issued more than two months after the Fall 2013 agenda, and less than four months before the Spring 2014 agenda, it was impossible for the agency to publish an agenda entry more than a few weeks before the proposed rule was published.

- Statutes with short regulatory deadlines.<sup>99</sup>
- Decisions late in the rulemaking process to divide a single rule into two or more rules.<sup>100</sup>
- Petitions for rulemaking and agency responses occurring between agenda cycles.<sup>101</sup>

Also, CMS published a series of economically significant final rules without any prior “final rule stage” entries in the agenda because the rules progressed through the rulemaking process quickly, and there was no time for a final rule stage agenda entry. For example:

- CMS published one proposed rule under the Affordable Care Act (ACA) on March 21, 2014, and then issued the final rule on May 27, 2014. Therefore, the final rule was published too late for a prior notice in the Fall 2013 agenda, and too soon for effective notice in the Spring 2014 agenda.<sup>102</sup>
- CMS had a statutory deadline to issue another ACA rule by March 31, 2014. The NPRM was issued on December 2, 2013, and the final rule was published on March 11, 2014. Therefore the final rule was too late for inclusion in the Fall 2013 agenda, and too early for the Spring 2014 edition (which was not posted until more than two months after the final rule was issued).<sup>103</sup>
- In another rule, the NPRM was published on January 10, 2014, and the final rule was published on the date the Spring 2014 edition of the agenda was published

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<sup>99</sup> For example, USDA’s April 2014 final rule on supplemental agricultural disaster assistance programs implemented specific requirements in Section 1501 of the Agricultural Act of 2014 (Public Law 113-79), which was enacted into law on February 7, 2014 – more than two months after the Fall 2013 edition of the agenda was published. For losses in program years 2012 and 2013, producers were required to file a notice of loss for each program year no later than August 1, 2014. In order to get the program in place, the statute required that the final rule be issued (without notice and comment) within 90 days – i.e., before the Spring 2014 edition of the agenda was published in late May 2014.

<sup>100</sup> For example, a CMS proposed rule that was published on May 23, 2014 (the same day that the Spring 2014 agenda was posted) was initially part of another, larger rule, but the agency decided late in the rulemaking process to publish the rule separately from the other rule (and under a different RIN). As a result, there was no prior agenda entry for the newly developed rule. (See U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, “Medicare and Medicaid Programs; Modifications to the Medicare and Medicaid Electronic Health Record Incentive Programs for 2014; and Health Information Technology: Revisions to the Certified EHR Technology Definition,” 79 FR 29732, May 23, 2014.)

<sup>101</sup> For example, CFTC’s June 2014 proposed rule on exclusion of utility operations-related swaps came about in response to petitions from regulated entities, and was immediately preceded by a March 14, 2014, staff letter recommending a change in the agency’s enforcement of the issue. (This letter can be accessed at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/14-34.pdf>.) Because this staff letter was issued more than three months after the Fall 2013 agenda, and more than two months before the Spring 2014 agenda, the agency could not publish a “proposed rule stage” agenda entry before publishing the proposed rule itself.

<sup>102</sup> CMS rule on “Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond,” RIN 0938-AS02. The agency had a “proposed rule stage” entry in the Fall 2013 agenda, and a “completed action” entry in the Spring 2014 agenda.

<sup>103</sup> CMS rule on “Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2015,” RIN 0938-AR89. The agency had a “proposed rule stage” entry in the Fall 2013 agenda, and a “completed action” entry in the Spring 2014 agenda.

(May 23, 2014). The final rule was reportedly published so quickly because the agency wanted policies to be in place for a contracting cycle.<sup>104</sup>

## 2. Lengthy OIRA Review

The four economically significant DOE/EE final rules that were published without a prior “final rule stage” agenda entry were delayed at OIRA at the proposed rule stage (three of them for more than a year).<sup>105</sup> On August 9, 2013, DOE agreed to a timetable to publish the four standards, preventing threatened legal action by the State of New York, nine other states, and the City of New York.<sup>106</sup> (All four rules had statutory deadlines for their issuance, and those deadlines had all passed.) Shortly after DOE agreed to this publication timetable, OIRA completed its review of three of the four draft proposed rules, and the proposed (and later the final) rules were published.

As **Table 13** below indicates, by the deadline for submission of data for the Fall 2013 agenda (August 29, 2013), three of the four proposed rules had not been published, and the fourth (Metal Halide Lamp Fixtures) had been published less than 10 days earlier (and was still open for comment). Because all four were still in the “proposed rule stage,” DOE could not have published a “final rule stage” entry in the Fall 2013 agenda for any of the four rules. By the deadline for submission of data for the Spring 2014 agenda (February 28, 2014), it was clear that all four final rules would soon be published.

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<sup>104</sup> CMS rule on “Medicare Program; Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs,” RIN 0938-AR37.

<sup>105</sup> (1) The “Energy Conservation Program: Energy Conservation Standards for Walk-In Coolers and Freezers” final rule was statutorily required to be published by January 1, 2012. The draft proposed rule was submitted to OIRA on September 23, 2011. OIRA reviewed the draft rule until August 29, 2013 – a total of 706 days. The proposed rule was published on September 11, 2013 (78 FR 55781), with comments permitted until November 9, 2013. The draft final rule was submitted to OIRA on February 20, 2014, and OIRA concluded its review of the draft final rule on May 8, 2014. The final rule was published on June 3, 2014 (79 FR 32050). (2) The “Energy Conservation Program: Energy Conservation Standards for Metal Halide Lamp Fixtures” final rule was statutorily required to be published by January 1, 2012. The agency submitted the draft proposed rule to OIRA on February 17, 2012 (six weeks after the deadline for the final rule), and OIRA reviewed the draft proposed rule until August 12, 2013 – a total of 543 days. The agency published the proposed rule on August 20, 2013 (78 FR 51464), with comments permitted until October 21, 2013. It then submitted the draft final rule to OIRA on December 31, 2013, and OIRA completed its review of the draft final rule on January 24, 2014. The final rule was published on February 10, 2014 (79 FR 7746). (3) The “Energy Conservation Program: Energy Conservation Standards for Commercial Refrigeration Equipment” final rule was statutorily required to be published by January 1, 2013. The agency submitted the draft proposed rule to OIRA on February 17, 2012, and OIRA reviewed the draft proposed rule until August 29, 2013 – a total of 559 days. The agency published the proposed rule on September 11, 2013 (78 FR 55889), with comments permitted until November 12, 2013. It then submitted the draft final rule to OIRA on January 22, 2014, and OIRA completed its review of the draft final rule on February 27, 2014. The final rule was published on March 28, 2014 (79 FR 17726). (4) The “Energy Conservation Program: Energy Conservation Standards for Commercial and Industrial Electric Motors” final rule was statutorily required to be published by December 19, 2012. The agency submitted the draft proposed rule to OIRA on July 17, 2013, and OIRA reviewed the draft proposed rule until November 22, 2013 – a total of 128 days. The agency published the proposed rule on December 6, 2013 (78 FR 73589), with comments permitted until February 4, 2014. It then submitted the draft final rule to OIRA on March 4, 2014, and OIRA completed its review of the draft final rule on May 8, 2014. The final rule was published on May 29, 2014 (79 FR 30934).

<sup>106</sup> See <http://www.ag.ny.gov/press-release/leading-multi-state-coalition-ag-schneiderman-obtains-commitment-federal-government>

However, two of the four final rules were published months before the Spring 2014 agenda was published, one rule was published the day after the agenda was issued, and the fourth rule was published less than a week later. Therefore, by the time the Spring 2014 agenda was published, a “final rule stage” entry in the agenda would have been erroneous or essentially useless as an advance notice of the rule.

**Table 13: Timetable for OIRA Review and DOE Publication of Four Energy Efficiency Rules**

	<b>Walk-In Coolers and Freezers (1904-AB86)</b>	<b>Metal Halide Lamp Fixtures (1904-AC00)</b>	<b>Commercial Refrigeration Equipment (1904-AC19)</b>	<b>Commercial and Industrial Electric Motors (1904-AC28)</b>
Statutory Deadline for Final Rule	01/01/ 2012	01/01/2012	01/01/2013	12/19/2012
Draft NPRM to OIRA	09/23/2011	02/17/2012	02/17/2012	07/17/2013
OIRA Concludes Review of Draft NPRM	08/29/2013	08/12/2013	08/29/2013	11/22/2013
<b>Deadline for Submission of Data for Fall 2013 Agenda</b>	<b>08/29/2013</b>			
NPRM Published	09/11/2013	08/20/2013	09/11/2013	12/06/2013
Fall 2013 Agenda Published	11/26/2013			
Draft Final Rule to OIRA	02/20/2014	12/31/2013	01/22/2014	03/04/2014
<b>Deadline for Submission of Data for Spring 2014 Agenda</b>	<b>02/28/2014</b>			
OIRA Concludes Review of Draft Final Rule	05/08/2014	01/24/2014	02/27/2014	05/08/2014
Spring 2014 Agenda Published	05/28/2014			
Final Rule Published	06/03/2014	02/10/2014	03/28/2014	05/29/2014
Agenda Entries	“Proposed” entries in 2011, 2012, and 2013; “Completed” entry in Spring 2014	“Proposed” entry in 2011; “Long-Term” entry in 2012; “Proposed” entries in 2013; “Completed” entry in Spring 2014	“Proposed” entries in 2012, and 2013; “Completed” entry in Spring 2014	“Proposed” entries in 2011, 2012, and 2013; “Completed” entry in Spring 2014

Source: Reginfo.gov.

### 3. No Clear Reason

In other cases, it was not clear from the rulemaking record why no prior entry in the Unified Agenda was published. For example:

- As noted previously, DOJ/ATF published a proposed rule related to gun control on January 7, 2014, that was not preceded by a “proposed rule stage” agenda entry. On the same day, HHS also published a proposed rule related to gun control that had been preceded by two “proposed rule stage” entries (in the Spring and Fall 2013 editions of the agenda).<sup>107</sup> A statement issued by the White House linked the two rules, characterizing them as “two new executive actions that will help strengthen the federal background check system and keep guns out of the wrong hands.”<sup>108</sup> If HHS could publish Unified Agenda entries for its proposed rule, it is not clear why DOJ/ATF was unable to do so for its rule issued on the same day.
- OPM and GSA each published proposed rules in late June 2014 that had the same point of origination.<sup>109</sup> GSA said that its proposed rule was being issued because the Supreme Court held in a June 2013 opinion that Section 3 of the Defense of Marriage Act was unconstitutional. (*United States v. Windsor*, 570 U.S. 12 (2013)). As a result of this decision, GSA said that it that it “is now able to extend travel and relocation entitlements to Federal employees who are legally married to spouses of the same sex.” OPM also referenced the June 2013 Supreme Court decision, noting it “will permit Federal employees who are in legal marriages with same-sex spouses to use their leave entitlement under the [Family and Medical Leave Act] in the same manner as Federal employees who are in legal marriages with opposite-sex spouses.” OPM had a “proposed rule stage” entry in the Fall 2013 edition of the agenda, but GSA did not. GSA published a proposed rule stage entry for its rule in the Spring 2014 edition of the agenda (its only agenda entry for the rule) only about a month before the proposed rule was published. If OPM could give the public more than six months notice of its upcoming proposed rule, it is not clear why GSA was unable to do so (since each was precipitated by the same Supreme Court decision).
- Almost exactly one year before DOL/EBSA published a May 2014 proposed rule on health care continuation coverage without a prior agenda entry,<sup>110</sup> the Department issued a technical release and an updated model election notice with additional information regarding health coverage options that would be available

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<sup>107</sup> U.S. Department of Health and Human Services, Office of the Secretary, “Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS),” 79 FR 784, January 7, 2014 (RIN 0945-AA05).

<sup>108</sup> See <http://www.whitehouse.gov/the-press-office/2014/01/03/fact-sheet-strengthening-federal-background-check-system-keep-guns-out-p>.

<sup>109</sup> Office of Personnel Management, “Family and Medical Leave Act; Definition of Spouse,” 79 FR 35497, June 23, 2014; and General Services Administration, “Federal Travel Regulation (FTR); Terms and Definitions for ‘Marriage,’ ‘Spouse,’ and ‘Domestic Partnership’,” 79 FR 36279, June 26, 2014.

<sup>110</sup> U.S. Department of Labor, Employee Benefits Security Administration, “Health Care Continuation Coverage,” 79 FR 26192, May 7, 2014.

beginning January 1, 2014 under the Affordable Care Act.<sup>111</sup> Therefore, it is unclear why there was no “proposed rule stage” entry for this rule in at least the Fall 2013 agenda.

- The May 2014 HHS/CMS rule on modifications to the Medicare and Medicaid electronic health record was authorized by the American Recovery and Reinvestment Act of 2009 (ARRA, Public Law 111-5). The agency published a related final rule in September 2012 (77 FR 53968), and the agency indicated that it was revising those requirements in response to comments subsequently received in public forums and listening sessions, but did not indicate when those comments were received. Given this history, it is not clear why there was no prior Unified Agenda entry for this rule.
- CFPB’s May 2014 proposed rule amending the annual privacy notice requirement began with the Bureau’s December 2011 Request for Information seeking suggestions from the public for streamlining regulations. In November 2013, CFPB published a study that included information on these privacy notices. The agency published “prerule stage” entries in the Spring and Fall 2013 editions of the agenda, but did not publish a “proposed rule stage” entry until nearly two weeks after the rule was published (in the Spring 2014 agenda). Unless CFPB did not decide to issue the proposed rule until after the November 2013 study was published, it is not clear why a “proposed rule stage” agenda entry could not have been published in the Fall 2013 agenda.
- The Department of Commerce’s March 2014 final rule “Implementation of the Understandings Reached at the June 2013 Australia Group (AG) Plenary Meeting and the December 2012 AG Intersessional Decisions” (79 FR 16664) implemented understandings reached in international meetings held more than nine months earlier. It is not clear why some type of advance notice regarding this rule could not have been published in the Fall 2013 agenda.<sup>112</sup>

## **VI. Whether Proposed and Final Rule Stage Agenda Entries Are Followed by Rulemaking**

As noted in the previous section of this report, about half of the significant proposed and final rules published during the first half of 2014 were preceded by one or more Unified Agenda entries that falsely predicted the issuance of those in the succeeding 12 months. This section of the report explores this phenomenon in greater depth, focusing on the “proposed rule stage” and “final rule stage” entries in the Spring 2013 edition of the agenda (issued on July 1, 2013) that were considered “economically significant” or

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<sup>111</sup> See Technical Release 2013-02 available at <http://www.dol.gov/ebsa/newsroom/tr13-02.html>.

<sup>112</sup> According to employees at the Department of Commerce, the Department had not received a reporting cable from the State Department and had not begun to draft the rule when information for the Fall 2013 agenda was being developed. By the time the Spring 2014 agenda was published, the final rule had already been issued.

“major.” Each of these entries was tracked during the succeeding 16 months (i.e., as of November 2014) to see if the predicted rules had been published. The research also examines how long each of those entries had been at that stage of the rulemaking process, and why the predicted rules were not published.

## A. Economically Significant or Major Proposed Rules

The Spring 2013 Unified Agenda contained 68 “proposed rule stage” entries that were in coded “economically significant” regulatory actions, and another 12 such entries that were coded “major” (but not economically significant) actions. However, for eight of these 80 entries, the agencies were simply reflecting open comment periods, and did not indicate that a proposed rule would be issued within the next 12 months. For example:

- HHS/FDA had two entries (RINs 0910-AG35 and 0910-AG36) that reflected open comment periods for NPRMs that were published in January 2013.
- HHS/CMS had three entries (RINs 0938-AR31, 0938-AR65, and 0938-AR66) that reflected open comment periods for previously published proposed rules.

Of the remaining 72 entries, three entries were later withdrawn by the agency, and listed in the “completed action” category of the agenda.<sup>113</sup> Therefore, a total of 69 agenda entries indicated that economically significant proposed rules would be published within the following 12 months (i.e., by May 2014), and those entries were not later withdrawn. Searches of the *Federal Register* by RIN in November 2014 (16 months after the Spring 2013 agenda was published) indicated that 28 of the 69 entries (41%) had not been published as notices of proposed rulemaking.

Some of the entries without a subsequent proposed rule had been in the “proposed rule stage” for a number of years *before* the Spring 2013 edition of the agenda. For example:

- One USDA/FSIS entry (“Egg Products Inspection Regulations,” 0583-AC58) had been in the proposed rule stage since the *Fall 1999* edition of the agenda (*26 editions in a row*, as of the Spring 2013 edition), when the NPRM was scheduled for June 2000. The Spring 2013 edition indicated that the NPRM was scheduled for June 2014, but the entry has not appeared in any subsequent agenda. Therefore, it is not clear whether this rulemaking action has been dropped, or whether it was moved into the “pending” category.
- One DOT/FMSCA entry (“Carrier Safety Fitness Determination,” RIN 2126-AB11) has been at the proposed rule stage continuously (*14 editions in a row*) since the *Fall 2007* edition of the agenda (when the agency projected the

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<sup>113</sup> The three withdrawn actions were (1) two VA entries on “Post-9/11 Improvements, Fry Scholarship, and Work-Study” (RIN 2900-AO07) and “Disabled Veterans Experiencing Difficulties Using Prosthetic Devices, Veterans Needing a Higher Level of Aid and Attendance for Traumatic Brain Injury, and Definition of Catastrophic Disability” (RIN 2900-AO16); both had been in the “proposed rule section” since the Fall 2011 agenda, and were withdrawn in February 2014; and (2) a HUD entry (“Home Investment Partnerships Program: Updating Energy Efficiency Standards (FR- 5678),” RIN 2501-AD58), which had been in the proposed rule section since 2012, and was withdrawn in March 2014.

proposed rule would be issued in May 2008). As of the Fall 2014 agenda, the projected issue date was April 2015.

- One DHS/TSA entry (“Standardized Vetting, Adjudication, and Redress Services,” RIN 1652-AA61) has been at the proposed rule stage since the **Fall 2007** edition of the agenda (*13 editions*, excluding one “long term action” entry in the Spring 2008), when the agency projected that the proposed rule would be issued in January 2008. As of the Fall 2014 agenda, the projected issue date was August 2015.
- Another DHS/TSA entry (“Security Training for Surface Mode Employees,” RIN 1652-AA55) has been in the proposed rule stage since the **Spring 2009** agenda (when the proposed rule was scheduled for January 2010) – *11 editions in a row*. As of the Fall 2014 agenda, the projected issue date was October 2015.
- One DHS/Coast Guard entry (“Updates to Maritime Security,” RIN 1625-AB38) has been in the proposed rule stage since the **Fall 2009** agenda (when the proposed rule was expected by March 2010) – *10 editions in a row*. As of the Fall 2014 agenda, the projected issue date was January 2015.

FDA had a total of six “economically significant” entries in the “proposed rule stage” section of the Spring 2013 agenda for which no proposed rule had been published (as of November 2014). These included:

- One entry (“Over-the-Counter (OTC) Drug Review--Pediatric Dosing for Cough/Cold Products,” RIN 0910-AG12) that had been at the proposed rule stage continuously since the **Fall 2008** edition (*12 editions in a row*).
- One entry (“Electronic Distribution of Prescribing Information for Human Prescription Drugs Including Biological Products,” RIN 0910-AG18) had been at that stage since the **Spring 2009** edition (*11 editions in a row*).
- One entry since the **Spring 2010** edition (“Over-the-Counter (OTC) Drug Review--Internal Analgesic Products,” RIN 0910-AF36).
- Two entries since the **Spring 2011** edition (“Requirements for the Testing and Reporting of Tobacco Product Constituents, Ingredients, and Additives,” RIN 0910-AG59, and “Amendments to the Current Good Manufacturing Practice Regulations for Finished Pharmaceuticals—Components,” RIN 0910-AG70).

## 1. Supplemental Notices

Some of the agenda entries indicated that an NPRM had already been published, but the rulemaking action was still in the proposed rule stage because some type of additional action related to the proposed rule was forthcoming. For example:

- One DHS/TSA entry (“General Aviation Security and Other Aircraft Operator Security,” 1652-AA53) indicated that a proposed rule had been published in October 2008, and that a supplemental NPRM (SNPRM) was to be issued. The

action has been in the “proposed rule stage” continuously since the **Fall 2009** edition of the agenda (with the supplemental proposed rule then scheduled for October 2010) – *10 agenda editions in a row*. As of the Fall 2014 edition of the agenda, the date for the SNPRM was “to be determined.”<sup>114</sup>

- One HHS/FDA entry (“Over-the-Counter (OTC) Drug Review--Internal Analgesic Products,” RIN 0910-AF36) indicated that an NPRM was published in 2006, but that amendments to the proposed rule were anticipated (e.g., for acetaminophen and pediatric uses). This entry has been at the “proposed rule stage” continuously since the **Spring 2010** edition (when the acetaminophen amendment was expected to be issued by March 2011). As of the Fall 2014 edition, the amendment was scheduled for December 2015.
- One DOL/EBSA entry (“Conflict of Interest Rule-Investment Advice,” RIN 1210-AB32) indicated that an NPRM had been published in October 2010, and that a second NPRM was yet to be published. The action has been in the “proposed rule stage” for this second NPRM since the **Fall 2011** edition of the agenda (which indicated that the second NPRM would be published in May 2012). The Fall 2014 agenda estimated that this second NPRM would be published in January 2015.

Several of the Spring 2013 “proposed rule stage” entries that did not result in proposed rules within the following 16 months may no longer be active (or may be in the “pending” category):

- One entry from HHS/FDA that had been in the “proposed rule stage” since the Spring 2011 agenda (“Amendments to the Current Good Manufacturing Practice Regulations for Finished Pharmaceuticals—Components,” RIN 0910-AG70) was moved to the “long term action” stage in the Fall 2013 agenda, and then was not in the Spring or Fall 2014 editions at all.
- As noted previously in this report, one USDA/FSIS entry (“Egg Products Inspection Regulations,” 0583-AC58) that had been in the proposed rule stage since the Fall 1999 edition of the agenda did not appear in the Fall 2013 or either of the 2014 editions of the agenda.

## **B. Final Rules**

The Spring 2013 Unified Agenda contained 61 “final rule stage” entries that were in coded “economically significant” regulatory actions, and another six such entries that

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<sup>114</sup> TSA said it is considering the following proposed provisions in the SNPRM: (1) security measures for foreign aircraft operators commensurate with measures for U.S. operators, (2) the type of aircraft subject to TSA regulation, (3) compliance oversight, (4) watch list matching of passengers, (5) prohibited items, (6) scope of the background check requirements and the procedures used to implement the requirement, and (7) other issues. In the Fall 2014 agenda, TSA moved this entry into the “long-term action” category.

were coded “major” (but not economically significant) actions. However, for two of these 67 entries, the agencies indicated that no final rule would be issued in the next 12 months.

- One of the entries (0584-AE09) from USDA/FNS simply reflected the upcoming effective date of a published interim final rule (and therefore perhaps should have been in the “completed action” section). The agency did not indicate that another final rule was forthcoming.
- Another such entry (2120-AJ58) simply announced the correction of an error in the final regulatory evaluation used to support a January 2012 rule. It too does not appear to meet the criteria established for a “final rule stage” entry (i.e., “actions for which agencies plan to publish a final rule or an interim final rule or to take other final action as the next step”).

Of the remaining 65 entries, searches of the *Federal Register* by RIN in November 2014 indicated that 37 of them (57%) had not been published as final rules. However, further investigation revealed that some of these apparently unpublished actions were, in fact, completed in some way.

- HHS/CMS finalized one of their regulatory actions in October 2013 with a “notice” and not a final rule.<sup>115</sup>
- Another CMS action (RIN 0938-AR80) was withdrawn in April 2014.<sup>116</sup>
- Another CMS action was finalized in November 2013 (with two other agencies) under a different CMS RIN.<sup>117</sup>
- A VA action (RIN 2900-AO40) was withdrawn in February 2014.<sup>118</sup>
- FDIC merged two of its actions into a third action under a different RIN, and published the interim final rule in October 2013.<sup>119</sup>
- The Postal Rate Commission published one of its actions as a final rule in August 2013, but did not use the RIN used in the Unified Agenda in the rule.<sup>120</sup> (As a result, searches of the *Federal Register* by RIN did not reveal the final rule.)

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<sup>115</sup> U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, “Medicare Program; Inpatient Hospital Deductible and Hospital and Extended Care Services Coinsurance Amounts for CY 2014,” 78 FR 64953, October 30, 2013. This action resulted in an \$870 million increase in Medicare payments.

<sup>116</sup> The action would have generally required certain Medicare and Medicaid providers and suppliers to offer all patients an annual influenza vaccination, unless medically contraindicated, or unless the patient or patient’s representative or surrogate declined vaccination.

<sup>117</sup> U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, Internal Revenue Service, and U.S. Department of Labor, Employee Benefits Security Administration, “Final Rules Under the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008; Technical Amendment to External Review for Multi-State Plan Program,” 78 FR 68240, November 13, 2013.

<sup>118</sup> VA indicated that it intended to issue an interim final rule to establish regulations regarding a new program to retrain unemployed veterans. The new program, known as the Veterans Retraining Assistance Program (VRAP), was authorized by section 211 of the VOW to Hire Heroes Act of 2011 (P.L. 112-56).

<sup>119</sup> Federal Deposit Insurance Corporation, “Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule,” 78 FR 55339, September 10, 2013. FDIC issued the final rule in April 2014.

Therefore, taking these seven entries away from the previous group of 37, it appears that 30 (46%) of the 65 economically significant “final rule stage” entries in the Spring 2013 agenda in which final action was expected within a year were not finalized in some way by November 2014.

## 1. Finalization of Interim Final Rules

At least 12 of these 30 entries appeared to be in the “final rule stage” section of the agenda because the agency indicated that it intended to finalize previously published interim final rules. These interim final rules were already in effect, but the agency indicated that it intended to issue final rules responding to public comments on the interim final rule and to otherwise complete the rulemaking. Some of these entries have been in the final rulemaking stage for years. For example:

- One DOJ/Drug Enforcement Administration (DEA) entry (“Retail Sales of Scheduled Listed Chemical Products; Chemical; Self-Certification of Regulated Sellers of Scheduled Listed Chemical Products,” RIN 1117-AB05) was first published in the final rule stage in the *Fall 2006* edition of the agenda, and has been in the final rule stage ever since – *16 editions of the agenda in a row* as of the Fall 2014 edition). DEA published an interim final rule in September 2006, closed the comment period in November 2006. The agency indicated in the Fall 2014 agenda that “final action” was expected in March 2015.
- U.S. Customs and Border Protection (CBP) within DHS published two interim final rules in 2008, and published “final rule stage” entries through the Spring 2014 edition (under RINs 1651-AA70, “Importer Security Filing and Additional Carrier Requirements,” and 1651-AA72, “Changes to the Visa Waiver Program To Implement the Electronic System for Travel Authorization (ESTA) Program”). CBP moved the first of these RINs into the “long-term action” category in the Fall 2014 agenda, and indicated that final action was not expected until February 2016. The second RIN was still in the final rule stage (*12 editions of the agenda in a row* since the interim final rule was published), with final action expected in March 2015.
- DHS/CBP published another interim final rule in January 2009, and has been indicating since the Spring 2009 agenda (RIN 1651-AA77, “Implementation of the Guam-CNMI Visa Waiver Program”) that it intends to take “final action” on the rule – *11 editions of the agenda in a row*. The Fall 2014 revised the date to August 2015.
- DHS/CBP published another interim final rule in August 2010, and has been indicating ever since (RIN 1651-AA83, “Electronic System for Travel Authorization (ESTA): Fee for Use of the System”) that it intends to issue a final rule – *nine agenda editions in a row*. The Fall 2014 agenda indicated that the rule would be issued in August 2015.

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<sup>120</sup> Postal Rate Commission, “Price Cap Rules for Certain Postal Rate Adjustments,” 78 FR 52694, August 26, 2013. The RIN for this rule was 3211-AA08.

- VA published an interim final rule in May 2011, and has been publishing “final rule stage” entries (RIN 2900-AN94, “Caregivers Program”) in all six editions of the agenda since then indicating that it planned to take “final action” in the future. The Fall 2014 edition of the agenda showed final action was expected in November 2014.
- USDA’s Rural Business-Cooperative Service (RBS) published two interim final rules in February 2011, and then published “final rule stage” entries in all subsequent editions of the agenda (under RINs 0570-AA73, “Biorefinery Assistance Program,” and 0570-AA75, “Bioenergy Program for Advanced Biofuels”) through the Spring 2013 edition. In the Spring 2013 edition, RBS indicated that the agency expected “final action” on these rules by December 2013. Since then, however, there have been no agenda entries for these actions. (It is not clear from the agenda whether these two planned regulatory actions have been discontinued by the agency, or whether the entries have just been moved to “pending.”)

## 2. Other Entries That Have Been in the Final Rule Stage for Years

The remaining 18 “final rule stage” entries are those that appeared in the Spring 2013 agenda, did not concern previously published interim final rules, and that as of November 2014 had not been published as final rules or otherwise completed. Some of these agenda entries were in the “final rule stage” much earlier than the Spring 2013 agenda. For example:

- HUD’s Office of Community Planning and Development has published “final rule stage” entries in the agenda for one of its actions (“Housing Trust Fund (FR-5405),” RIN 2506-AC30) since the **Spring 2011** edition (seven agenda editions in a row). The agency published a notice of proposed rulemaking in October 2010, but there has been no rulemaking action since then. In the Fall 2014 edition, the agency said it expected the final rule to be published in December 2014.

Five of the 18 entries were first in the “final rule stage” as part of the **Fall 2011** edition of the agenda (six agenda editions in a row):

- DOL/OSHA, “Walking Working Surfaces and Personal Fall Protection Systems (Slips, Trips, and Fall Prevention,” RIN 1218-AB80).
- USDA/FNS, “Eligibility, Certification, and Employment and Training Provisions of the Food, Conservation, and Energy Act of 2008,” RIN 0584-AD87.
- HHS/FDA, “Food Labeling: Nutrition Labeling for Food Sold in Vending Machines,” 0910-AG56; and “Food Labeling: Nutrition Labeling of Standard Menu Items in Restaurants and Similar Retail Food Establishments,” RIN 0910-AG57).<sup>121</sup>

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<sup>121</sup> These rules were published in December 2014 (79 FR 71155 and 79 FR 71259).

- NRC, “Domestic Licensing of Source Material-Amendments/Integrated Safety Analysis [NRC-2009-0079],” but now called “Domestic Licensing of Source Material--Amendments/Integrated Safety Analysis [NRC-2009-0079];” RIN 3150-AI50).<sup>122</sup>

Seven “final rule stage” entries in the Spring 2013 edition of the Unified Agenda actually started in that stage as part of the **2012** edition of the agenda, and all were still “final rule stage” entries as of the Fall 2014 edition.

- USDA/FNS, “Supplemental Nutrition Assistance Program: Farm Bill of 2008 Retailer Sanctions,” RIN 0584-AD88;
- HHS/CMS, “Covered Outpatient Drugs (CMS-2345-F),” RIN 0938-AQ41;
- DHS/Coast Guard, “Commercial Fishing Vessels--Implementation of 2010 and 2012 Legislation,” RIN 1625-AB85;
- EPA/Solid Waste and Emergency Response, “Revising Underground Storage Tank Regulations--Revisions to Existing Requirements and New Requirements for Secondary Containment and Operator Training,” RIN 2050-AG46;
- DOT/NHTSA, “Electronic Stability Control Systems for Heavy Vehicles (MAP-21),” RIN 2127-AK97;
- DOT/PHMSA, “Pipeline Safety: Enforcement of State Excavation Damage Laws,” RIN 2137-AE43; and
- CFTC, “Core Principle 9 for Designated Contract Markets,” RIN 3038-AD90.

## C. Summary

According to the introduction to the Unified Agenda, “proposed rule stage” entries are supposed to reflect “actions for which agencies plan to publish a Notice of Proposed Rulemaking as the next step in their rulemaking process or for which the closing date of the NPRM Comment Period is the next step.” “Final rule stage” entries are supposed to reflect “actions for which agencies plan to publish a final rule or an interim final rule or to take other final action as the next step.” In general, the activities included in these parts of the agenda are those that are expected to have a regulatory action within the next 12 months. Items under development but that are not expected within the next 12 months are supposed to be in the “long-term action” section of the agenda. Because the Spring 2013 agenda was issued on July 1, 2013, the proposed and final rule stage agenda entries suggested that proposed and final rules could be expected by July 1, 2014.

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<sup>122</sup> The agency published an NPRM in May 2011. In the Fall 2011 edition, NRC estimated that the final rule would be issued in September 2012. In the Spring 2013 edition, NRC said the final rule should be issued by October 2013. However, by the Fall 2013 edition, NRC listed it as a “long-term action,” and said the issuance was “to be determined.” In the Spring 2014 edition, NRC still had it in “long term actions,” but estimated the issuance of the final rule in September 2015. The entry did not appear in the Fall 2014 edition of the agenda.

However, as of November 2014 (16 months after the Spring 2013 agenda was issued), about 41% of the predicted proposed rules had not been published, and 46% of the predicted final rules had not been issued. A number of the entries for which proposed and final rules were not published had been in the “proposed rule stage” or the “final rule stage” for *years* before the Spring 2013 edition of the agenda, and some remain in that stage. When rules appear in the same stage of the Unified Agenda year after year with no action, and the agencies just simply change the estimated date of publication by another six months or a year, users of the agenda would understandably begin to question whether any new date is any more believable than the earlier ones. Over time, the information on expected publication dates becomes misinformation, and the credibility of the Unified Agenda suffers when the predicted rules are repeatedly not issued.

#### **D. Comparison to Prior Period**

To determine whether these results were unique, the author also examined all “economically significant” and/or “major” proposed and final rule stage entries in the Spring 2010 agenda (which was issued on April 7, 2010), and tracked those entries by RIN to determine if the projected proposed and final rules were published within the following 16 months (i.e., by August 7, 2011). For the 60 economically significant and/or major proposed rule stage entries in the Spring 2010 agenda,<sup>123</sup> 30 entries (50%) were published in the following 16 months, and 30 entries (50%) were not. For the 65 final rule stage entries in the Spring 2010 agenda, 37 entries (57%) were published during the following 16 months and 28 entries (43%) were not published.

Therefore, the results were fairly consistent to the later period. The Spring 2013 agenda did a somewhat better job of predicting the publication of proposed rules (41% of the proposed rule stage entries in the Spring 2013 agenda were not published in the following 16 months, compared to 50% of the entries in the Spring 2010 agenda), but did a slightly worse job of predicting the publication of final rules (46% of the final rule stage entries were not published, compared to 43% of the entries in the Spring 2010 agenda).

#### **E. Why Predicted Proposed and Final Rules Were Not Issued**

The senior agency employees interviewed for this report offered a variety of explanations for why proposed and final rule stage entries stay in the Unified Agenda year after year without any rules being issued.

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<sup>123</sup> Entries were excluded if the proposed rule had already been published and they were in the proposed rule stage of the agenda only because of an open comment period.

## **1. Human Nature**

Several of the senior agency employees blamed various elements of human nature for the delays. One said agency staff are “perpetually optimistic” about when rules are going to be issued, and have good intentions about getting a particular rule finished, but unanticipated events will sometimes make publication impossible. Another senior employee said agencies often “bite off more than they can chew,” and put more in the agenda than they can actually issue within the next 12 months (or even longer).

Another such employee cited a tendency of agency staff to change the dates only a small amount when it is clear that a particular rule will not be issued for another year. He said he tells the staff that if they know it will take another year to issue a rule, they should not just change the date by a few months. If a rule is not going to be issued in the next 12 months but the agency is still actively considering it, then the rule should be moved to the “long-term action” category. He said this type of incremental delay is most likely for rules with no statutory or judicial deadlines, and no imminent health or safety issues.

One other senior employee said her agency tries to put regulatory actions in the agenda as far in advance of rulemaking as possible. When something happens to delay a rule, she said it is very hard to ask the staff to take things out of the agenda because, from their perspective, either dropping it from the agenda entirely or putting it in “pending” “has the wrong optics,” making it appear to anyone reading the agenda that the rule is never coming back. Therefore, she said they just keep it in long-term action category or some other agenda category. By having it visible in the agenda, even for long periods, she said it tells the public “we are still working on it.”

## **2. Shifting Priorities and Resources**

Several of the senior agency employees mentioned shifting agency priorities for the rule delays. When a rulemaking is begun, the agency may be headed in one direction, but changes in political or agency leadership, resources, natural disasters, and other events can cause those priorities to change. As a result, other rulemaking actions take precedence, causing the rule to fall down the priority list. Employees at one agency said that one rule had been at the same stage of the agenda for more than five years because of such shifting priorities and changes in resource allocations.

One senior employee said delays of more than a year in the issuance of a rule are often due to changes in agency priorities or political concerns, and lengthy rule delays can create still other problems. For example, the employee said that one of his agency’s rules that was in multiple editions before being published was delayed in part because it was ultimately considered an “old rulemaking” in that no one believed was still current. Also, there was not a particular sense of urgency behind finalizing the requirements, the agency suffered from staff turnover, and the agency’s leadership decided that there were more pressing rules that needed to be issued. All of these factors, he said, made it a “management challenge” to issue the rule. An employee in another agency said one rule

languished because it had no deadline for issuance, and was not considered a priority until a court-ordered deadline was established. Once the deadline was established, the rule was issued within a few months.

Another senior employee indicated that estimated publication dates in the Unified Agenda are sometimes missed because the agenda is only a “snapshot in time” of the agency’s intentions. He said it is the agency’s intent to try and give the public the best notice possible, but changes in rulemaking priority can occur between agenda cycles. He characterized the semiannual structure of the agenda as “way outdated,” and said his agency has the ability to give the public more timely information.

### **3. Political Concerns**

Several of the senior agency employees indicated that political pressure from interest groups and others can cause agenda items to be continually listed in the proposed or final rule stage of the agenda, even when the agency knows that the rule is unlikely to be issued within the next 12 months. One of these employees said one of his agency’s rulemaking actions has been stuck at the “proposed rule stage” in the agenda for more than four years, and should have been moved to “long-term action” category but has not because outside groups want the agency to continue to show the rule as under active consideration. Several of the senior employees mentioned that different administrations use the Unified Agenda in different ways, with some erring on the side of including everything the agencies are considering, while in other administrations the goal is to only include things that are priorities and expected to be released in the near future.

### **4. Rulemaking Process**

Some of the senior agency employees indicated that rules are sometimes delayed because of unexpected problems that arise during the rulemaking process. For example, one of these employees said that one of his agency’s rules was delayed when, during the preparation of the required regulatory impact analysis, it became clear that the agency did not have the data on regulatory benefits that were needed to offset what clearly would be substantial regulatory costs. Another senior employee said economically significant or major rules are “heavy lifts” from the start, and susceptible to delay. Similarly, an employee in another agency said that complex rules that require a lot of analysis can be delayed by lack of data or staff changes. Senior staff at another agency said several rules had been in the “final rule” stage of the agenda for more two years or more because they required extensive analysis and review, including consideration of numerous public comments.

Other senior agency employees indicated that some rules have been stuck at the “final rule stage” of the agenda because OIRA has not allowed the agency to submit the draft final rules for review under EO 12866, or because once submitted, the reviews took much

longer than expected.<sup>124</sup> (OIRA was not provided with the specifics of this concern, and therefore did not have a specific response. However, they disagreed with this characterization, which in their view misconstrues OIRA's role in the regulatory process.)

## 5. Nature of the Regulatory Action

Although not mentioned by the senior agency employees interviewed for this report, some proposed rules that were predicted by the agenda may not have been issued because they were just supplements to previous NPRMs. Similarly, some predicted final rules may not have been published because they were just finalizations of previously published interim final rules. Once an agency has published an interim final rule, the rule is typically goes into effect either immediately or shortly thereafter. And while agencies generally should publish “final-final” rules responding to any comments received on the interim final rule,<sup>125</sup> agencies may not do so for long periods of time because the rule is already in effect and it is not a priority for the agency.

## F. Discontinued Rulemaking Actions

As noted earlier in this section of the report, some of the proposed and final rule stage entries in the Spring 2013 edition of the agenda were later moved into the “completed action” category, with the agency noting in the timetable section of the completed entry that the action had been “withdrawn” as of a particular date. For example:

- HHS/CMS had published final rule stage entries for its “Influenza Vaccination Standard for Certain Participating Providers and Suppliers (CMS-3213-F)” (RIN 0938-AR80) in the Spring 2013 and the Fall 2013 editions of the agenda. However, in the Spring 2014 edition, CMS listed the action as “completed/withdrawn” on April 18, 2014.
- VA had published proposed rule stage entries in four straight editions of the agenda (Fall 2011 through Fall 2013) for its action entitled “Disabled Veterans Experiencing Difficulties Using Prosthetic Devices, Veterans Needing a Higher Level of Aid and Attendance for Traumatic Brain Injury, and Definition of Catastrophic Disability” (RIN 2900-A016). However, in the

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<sup>124</sup> For more on this issue, see Curtis W. Copeland, *Length of Rule Reviews by the Office of Information and Regulatory Affairs*, December 2, 2013, pp. 38-40, available at <http://www.acus.gov/sites/default/files/documents/Revised%20OIRA%20Report%20Re-posted%202-21-14.pdf>. ACUS recommended that “Though OIRA has the final authority for determining which rules will be classified as “significant,” the agency should decide the point at which it will submit a draft rule to OIRA for review under EO 12,866.” <http://www.acus.gov/sites/default/files/documents/OIRA%20Statement%20FINAL%20POSTED%2012-9-13.pdf>. During this review, the agency officials said that while some rules are still not allowed to be submitted, this is less of a problem now than it was prior to the 2012 election.

<sup>125</sup> Michael Asimow, “Interim-Final Rules: Making Haste Slowly,” *Administrative Law Review*, vol. 51 (1999), pp. 703-755.

Spring 2014 edition of the agenda, the agency listed the action as “completed/withdrawn” on February 11, 2014.

These “completed/withdrawn” entries allow the public to know when certain rulemaking actions have been discontinued, but not all agencies publish such entries. Some rulemaking actions have been published in multiple editions of the Unified Agenda, but then the next edition of the agenda contains no entry for the action at all. When this occurs, it is not clear whether or not the agency still intends to publish a proposed or final rule on the topic. For example:

- A USDA/FSIS entry on “Egg Products Inspection Regulations” (RIN 0583-AC58) was listed in the agenda at the proposed rule stage from the Fall 1999 edition of the agenda until the Spring 2013 edition – *26 editions in a row*. However, this entry has not been listed in the agenda since the Spring 2013 edition.
- An HHS/FDA entry on “Amendments to the Current Good Manufacturing Practice Regulations for Finished Pharmaceuticals—Components” (RIN 0910-AG70) was listed in the proposed rule stage section of the agenda from the Spring 2011 edition through the Spring 2013 edition, and then was moved to the long-term action category in the Fall 2013 edition. However, the Spring 2014 edition of the agenda contained no listing for this rulemaking action.
- A USDA/RBS entry on the “Biorefinery Assistance Program” (RIN 0570-AA73) was listed in the agenda at the final rule stage from the Fall 2010 edition through the Spring 2013 edition. The agency published an interim final rule on this issue in February 2011 (76 FR 8403), but the agency indicated in the Spring 2013 agenda that a final rule (finalizing the interim final rule) was still to be issued. The agency has not published any agenda entries for this rule since then.
- Another USDA/RBS entry, this one on “Bioenergy Program for Advanced Biofuels” (RIN 0570-AA75), followed a similar path. It was listed in the final rule stage from the Fall 2010 edition through the Spring 2013 edition. The agency published an interim final rule in February 2011 (76 FR 7936), but last indicated in the Spring 2013 edition that a final rule was still to be issued in December 2013.

In some cases, agencies have listed rulemaking actions in the “completed/withdrawn” category, but only after the action was absent from one or more editions of the agenda. For example, an HHS/FDA entry on “General Hospital and Personal Use Devices: Issuance of Draft Special Controls Guidance for Infusion Pumps” (RIN 0910-AG54) was listed at the proposed rule stage in four straight editions of the agenda (from the Fall 2010 edition through the 2012 edition), but was not listed at all in the Spring or Fall 2013 editions. Therefore, users of the agenda had no idea what had happened to this

rulemaking action until the action was listed as completed/withdrawn action in the Spring 2014 edition.

## 1. Reasons for Discontinuance Often Not Provided

Even when agencies publish “completed/withdrawn” entries, the public is generally not told why the rulemaking action was discontinued. In fact, the abstract section of the agenda is usually unchanged from previous entries, making it appear that the agency is still planning to issue the rule. For example, in the 2012 and both 2013 editions of the agenda, HUD indicated that it was planning to issue a proposed rule on the “Home Investment Partnerships Program: Updating Energy Efficiency Standards” (RIN 2501-AD58). In the Spring 2014 edition, HUD moved the entry to the “completed action” category, and under the timetable said the rule had been withdrawn on March 7, 2014. However, the wording of the abstract for the entry was unchanged from when it was in the proposed rule stage of the agenda, and still suggested that a rule was needed:

HUD's HOME Investment Partnerships Program (HOME program or HOME) provides formula grants to States and units of local Government to fund a wide range of activities directed to producing or maintaining affordable housing, both homes and rental housing. This rule proposes amendments to the HOME program regulations that would update energy and water efficiency standards, applicable to housing assisted by HOME funds. These standards also have not been substantively addressed since 1996, and changes to energy and water efficiency products over the past 15 years have made significant strides in being both less costly to make and yielding savings in energy costs.

In a few cases, though, the agency not only listed the rule in the agenda as having been “completed/withdrawn” in the agenda, but also published a *Federal Register* notice indicating why the rule had been withdrawn. For example, DOT/FMSCA published an NPRM in December 2007 on “Minimum Training Requirements for Entry-Level Commercial Motor Vehicle Operators” (72 FR 73226), and subsequently had final rule stage entries in the agenda from the Fall 2008 edition through the Spring 2011 edition. Then, from the Fall 2011 edition through the Fall 2013 edition, the entry was in the long-term action category. Finally, in the Spring 2014 edition, the agency identified it as “completed/withdrawn,” and stated that the agency had published a notice of withdrawal in the *Federal Register*. That notice (78 FR 57585) stated that the agency was withdrawing the 2007 proposed rule because (among other things) comments regarding the NPRM and participants in public listening sessions since then had “raised substantive issues” regarding the rule. Therefore, the agency said it had decided that a completely new rulemaking effort should be initiated “in lieu of completing the 2007 rulemaking.”

## 2. No Requirements for Withdrawals

The RISC Executive Director said that if an agency has clearly decided not to pursue a rulemaking action, the agency will sometimes put it in the “completed action” category in the next edition of the agenda, and may also include an explanation as to why the action

is no longer being pursued. On the other hand, he said some agencies just stop providing agenda entries for such actions. The Executive Director said such decisions are the agencies' alone, and RISC does not tell the agencies that rulemaking actions they decide to discontinue should be "completed" in the published agenda. If an action is dropped from the agenda without explanation, he said the public could always call the listed agency contact person in the previous edition of the agenda and inquire as to why the action was no longer listed. (Of course doing so would first require the public to realize that a previously listed agenda item was no longer being listed.)

One of the senior agency employees interviewed for this report said that, although there is currently no general requirement to do so, if an agency has already published a proposed rule, the agency should not just take the rulemaking action out of the agenda without an explanation. He said that his agency puts such actions in "completed/withdrawn" category. Employees in another agency agreed, saying that other than an agency voluntarily listing an action as "completed/withdrawn, there is currently "no mechanism in the Unified Agenda for communicating why an entry has been removed."

Another agency employee said that if her agency has not published an NPRM for an agenda entry, or if the agency has received no comments on the notice, they can conclude the rulemaking with just a "completed action" entry in the agenda. However, if the agency has gotten comments from the public in response to an NPRM, then they have to address those comments in a *Federal Register* notice and explain why the rulemaking is not going forward. At a minimum, she said her agency uses "completed/withdrawn" to conclude a discontinued rulemaking action. She said the agenda would be more useful and informative if there was a general requirement that all agencies do so when previously active rulemaking is discontinued.

A senior employee in another agency said one rule whose agenda entries just stopped was put on hold after the agency got new statutory authority. The agency decided to "take a step back and look at the agency's regulatory approach" in light of the statute and new congressional mandates. She said the rule was "on hold" (perhaps in the "pending" category kept separate from the agenda), and may come back to life at some point, so the agenda entry was not put in the "completed/withdrawn" category.

## **VII. Accuracy of Unified Agenda Information**

In addition to identifying which proposed and final rules are to be issued in the succeeding 12 months, the Unified Agenda also provides information about the projected timing and content of the rules – e.g., whether the forthcoming rule (1) will be "major" under the Congressional Review Act, (2) will be "economically significant" or "other significant" under Executive Order 12866, and (3) will require an analysis under the Regulatory Flexibility Act. To determine the accuracy of this information, this study

focused on the significant proposed and final rules that were published during the first six months of 2014, and compared the information in the rule to the information in previous editions of the Unified Agenda.

## **A. Forecasting the Issue Date**

The August 2014 OIRA data call states that agencies are to provide for each agenda entry “the dates and citations (if available) for all past steps and a projected date for at least the next step for the regulatory action.” It also states “many entries are listed with projected dates that have simply been moved forward year after year, with no action taken. Unless you realistically intend to take action, please remove these items from the Agenda.”

### **1. Proposed Rules**

#### *a. Cabinet Departments and Independent Agencies*

The Cabinet departments and independent agencies’ last Unified Agenda entries before the publication of proposed rules were usually accurate within a month or two of the actual dates of issuance, but only because the agencies often changed the estimated dates of issuance over multiple editions of the agenda. Even in these instances, the agencies’ last estimated publication dates were sometimes off by several months. For example:

- FDA/HHS published “proposed rule stage” Unified Agenda entries for one rule in seven consecutive editions of the agenda, from the Spring 2010 edition (which estimated the issuance date as October 2011) through the Fall 2013 edition (which estimated the issuance date as December 2013). The rule was ultimately published in April 2014.<sup>126</sup>
- The Children and Families Administration within HHS published “proposed rule stage” Unified Agenda entries for one of its rules in nine consecutive editions of the agenda, starting in the Spring 2009 edition (which estimated the issuance date as December 2009) through the Fall 2013 edition (which estimated the issuance date as February 2014). The rule was ultimately published in April 2014.<sup>127</sup>
- The Civil Rights Division within the Department of Justice published “proposed rule stage” entries for one of its rules in nine straight editions of the agenda, from the Spring 2009 edition (which estimated the subject proposed rule’s issuance as September 2009) through the Fall 2013 edition (which estimated the rule’s

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<sup>126</sup> U.S. Department of Health and Human Services, Food and Drug Administration, “Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Regulations on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products,” 79 FR 23142, April 25, 2014.

<sup>127</sup> U.S. Department of Health and Human Services, Administration for Children and Families, “Runaway and Homeless Youth,” 79 FR 21064, April 14, 2014.

issuance as November 2013). The rule was ultimately published in late January 2014.<sup>128</sup>

- DOT's Federal Motor Carrier Safety Administration (FMCSA) published "proposed rule stage" entries for one of its rules in eight straight editions of the agenda, starting with the Fall 2009 edition (which estimated the subject proposed rule's issuance as August 2010) through the Fall 2013 edition (which estimated the rule's issuance as December 2013). The rule was ultimately published in February 2014.<sup>129</sup>

Perhaps even more troubling, in 10 of the proposed rules issued by Cabinet departments and independent agencies, the last "proposed rule stage" Unified Agenda entry was published *after* the rule had been issued, but the agenda suggested that that the rule was still forthcoming. For example:

- A proposed rule was published by the Federal Highway Administration (FHWA) within the Department of Transportation (DOT) on March 11, 2014 (79 FR 13846, RIN 2125-AF52), but the Spring 2014 agenda that was published more than two months later on May 23, 2014, indicated that the rule would not be issued until May 2014.<sup>130</sup>
- DOD published a proposed rule on May 8, 2014 (79 FR 26381, RIN 0790-AJ07), but the Spring 2014 agenda published more than two weeks later indicated that the rule would not be issued until August 2014.<sup>131</sup>
- Another DOD proposed rule was published on May 14, 2014 (79 FR 27516, RIN 0790-AJ08), but the Spring 2014 agenda published nine days later indicated that the rule would not be issued until September 2014.<sup>132</sup>

The same pattern of changing projected issuance dates was also generally true with regard to the independent regulatory agencies, although there were only seven rules with prior "proposed rule stage" agenda entries, and there were only three of those rules that had more than two prior entries. Even so, the agencies adjusted their projected issue dates over time, with the last entry sometimes still off by months.

- SEC published "proposed rule stage" entries for one of its rules in three straight editions of the Unified Agenda (2012 through Fall 2013), with the projected

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<sup>128</sup> U.S. Department of Justice, "Office of the Attorney General; Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008," 79 FR 4839, January 30, 2014.

<sup>129</sup> U.S. Department of Transportation, Federal Motor Carrier Safety Administration, "Commercial Driver's License Drug and Alcohol Clearinghouse," 79 FR 9703, February 20, 2014.

<sup>130</sup> In addition to the Spring 2014 edition of the Unified Agenda, "proposed rule stage" agenda entries for the rule had appeared in three previous editions of the agenda (2012 and Spring/Fall 2013).

<sup>131</sup> One previous "proposed rule stage" Unified Agenda entry had been published for this rule in the Fall 2013 edition of the agenda.

<sup>132</sup> One previous "proposed rule stage" Unified Agenda entry had been published for this rule in the Fall 2013 edition of the agenda.

issuance date changing from January 2013 to November 2013. The rule was ultimately published near the end of January 2014.<sup>133</sup>

- CFPB also published “proposed rule stage” entries for one of its rules in three straight editions of the Unified Agenda (2012 through Fall 2013), with the projected issuance date changing from March 2013 to November 2013. The rule was ultimately published on January 31, 2014.<sup>134</sup>
- Of the four agencies that published a proposed rule in April 2014, one had prior “proposed rule stage” entries in three editions of the agenda. The projected publication date changed from June 2013 (in the 2012 edition) to December 2013 (in the Fall 2013 edition).<sup>135</sup>

Even when there was only one prior “proposed rule stage” entry for a rule, the projected issuance date for the proposed rule was sometimes off by months.<sup>136</sup>

## 2. Final Rules

As was the case with the proposed rules, Cabinet departments and independent agencies’ last Unified Agenda entries before the publication of final rules were usually accurate within a month or two of the actual dates of issuance, but only because the agencies often changed the estimated dates of issuance over multiple editions of the agenda. Even in some of these instances, the agencies’ last estimated publication dates were off by several months. For example:

- FDA published “final rule stage” agenda entries for one rule in *18 consecutive editions* of the agenda, starting in the Fall 2004 edition (which estimated the issuance date as September 2005) through the Fall 2013 edition (which estimated the issuance date as November 2013). The rule was ultimately published in February 2014.<sup>137</sup>
- The Occupational Safety and Health Administration (OSHA) within DOL published “final rule stage” entries for one rule in eight consecutive editions of the agenda, starting in the Fall 2009 edition (which estimated the issuance date as September 2010) through the Fall 2013 edition (which estimated the issuance date as November 2013). The rule was ultimately published in April 2014.<sup>138</sup>

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<sup>133</sup> Securities and Exchange Commission, “Proposed Rule Amendments for Small and Additional Issues Exemptions Under Section 3(b) of the Securities Act,” 79 FR 3926, January 23, 2014.

<sup>134</sup> Bureau of Consumer Financial Protection, “Defining Larger Participants of the International Money Transfer Market,” 79 FR 5302, January 31, 2014.

<sup>135</sup> Comptroller of the Currency, the Federal Reserve System, the Federal Deposit Insurance Corporation, the Consumer Financial Protection Bureau, and the Federal Housing Finance Agency, “Minimum Requirements for Appraisal Management Companies,” 79 FR 19521, April 9, 2014.

<sup>136</sup> For example, in its only “proposed rule stage” entry in the Unified Agenda, the SEC projected the issuance date of one of its proposed rules to be December 2013; the rule was not issued until March 26, 2014 (79 FR 16866).

<sup>137</sup> U.S. Department of Health and Human Services, Food and Drug Administration, “Current Good Manufacturing Practices, Quality Control Procedures, Quality Factors, Notification Requirements, and Records and Reports, for Infant Formula,” 79 FR 7934, February 10, 2014.

<sup>138</sup> U.S. Department of Labor, Occupational Safety and Health Administration, “Electric Power Generation,

- The Food and Nutrition Service within USDA published “final rule stage” entries for one rule in six consecutive editions of the agenda, starting in the Fall 2010 edition (which estimated the issuance date as June 2011) through the Fall 2013 edition (which estimated the issuance date as February 2014). The rule was ultimately published in March 2014.<sup>139</sup>
- DOD published “final rule stage” agenda entries for one rule in five consecutive editions of the agenda, starting in the Spring 2011 edition (which estimated the issuance date as August 2011) through the Fall 2013 edition (which estimated the issuance date as January 2014). The rule was ultimately published in April 2014.<sup>140</sup>
- The Transportation Security Administration (TSA) within DHS published “final rule stage” agenda entries for one rule in seven consecutive editions of the agenda, starting in the Spring 2010 edition (which estimated the issuance date as December 2010) through the Fall 2013 edition (which estimated the issuance date as November 2013). The rule was ultimately published in January 2014.<sup>141</sup>

In several of the final rules issued by Cabinet departments and independent agencies, the last Unified Agenda entry for the final rule was published *after* the rule had been issued, but the agenda suggested that that the rule was still forthcoming. For example:

- SBA published a rule on March 21, 2014, but the Spring 2014 agenda published more than two months later indicated that the rule would not be published until December 2014.
- DOD/DARC published an interim final rule on February 28, 2014, and a final rule on March 31, 2014, but the Spring 2014 agenda that was published more than two months later on May 23, 2014, indicated that the final rule would not be issued until May 2014.
- DOD/DARC published another final rule on May 6, 2014, but the Spring 2014 agenda published more than two weeks later indicated that the rule would not be issued until July 2014.

Also, there were examples of the Unified Agenda misstating when soon-to-be-published rules would be issued. For example:

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Transmission, and Distribution; Electrical Protective Equipment,” 79 FR 20316, April 11, 2014. This rule had a total of 33 Unified Agenda entries going back to the Fall 1997 edition (varying between “prerule,” “long-term action,” and other types of entries.

<sup>139</sup> U.S. Department of Agriculture, Food and Nutrition Service, “Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Revisions in the WIC Food Packages,” 79 FR 12274, March 4, 2014. The agency’s “final rule stage” entries for this rule actually started in the Spring 2009 edition (which estimated the publication date as February 2011), but the entry was in the “long-term action” section in the Spring 2010 edition.

<sup>140</sup> U.S. Department of Defense, “Department of Defense Personnel Security Program (PSP),” 79 FR 18161, April 1, 2014.

<sup>141</sup> U.S. Department of Homeland Security, Transportation Security Administration, “Aircraft Repair Station Security,” 79 FR 2119, January 13, 2014.

- DVA published a rule on June 6, 2014, but the Spring 2014 edition of the agenda published two weeks earlier indicated that the rule would not be published until August 2014.
- IRS published a rule on June 12, 2014, but the Spring 2014 edition of the Unified Agenda published three weeks earlier indicated that the rule would not be issued until December 2014.

## **B. Identifying the Priority of the Rule**

The instructions for preparing the Unified Agenda require agencies to select one of five categories to indicate the priority of each entry: economically significant, other significant, substantive non-significant, routine and frequent, and informational/administrative/other. Agencies were told that actions designated as “major” under the Congressional Review Act should have a priority of either “economically significant” or “other significant.”

### **1. Proposed Rules**

#### *a. Cabinet Departments/Independent Agencies*

Of the 88 significant proposed rules published during the first half of 2014, 83 of the rules had a prior “proposed rule stage” Unified Agenda entry. Of these 83 proposed rules, the last agenda entries indicated that the priority level of 23 (28%) of the upcoming rules would be at one level, but the level indicated in the published rules was something else. Specifically:

- In 18 of the rules, the last agenda entry indicated that the upcoming rule would be “substantive, nonsignificant,” but the rule indicated that it was “other significant.”
- In three of the rules, the last agenda entry indicated that the upcoming rule would be “other significant,” but the rule indicated that it was “economically significant.”
- In one rule, the last agenda entry indicated that the upcoming rule would be “substantive, nonsignificant,” but the rule indicated that it was “economically significant.”
- In one rule, the agenda entry indicated that the upcoming rule would be “economically significant,” but the rule indicated that it was “other significant.”

Therefore, in 22 of the 23 cases with inaccurate agenda information, the priority of the rule as issued turned out to be higher than the agenda indicated. The most extreme example of this was a proposed rule issued by the Department of Labor’s Wage and Hour

Division, which indicated in the only Unified Agenda entry for the rule (published less than a month before the rule was published) that the rule would be “substantive, nonsignificant,” but the rule turned out to be “economically significant.”<sup>142</sup> More commonly, the agencies indicated that the upcoming rule would be “substantive, nonsignificant” but the rule turned out to be “other significant.” In some cases, there were multiple prior indications of the rules’ priority that turned out to be wrong. For example:

- The Bureau of Indian Affairs within DOI indicated in three successive issues of the agenda (the Spring and Fall 2013, and Spring 2014) that a forthcoming proposed rule was “substantive, nonsignificant,” but the NPRM (published less than a week after the Spring 2014 agenda was issued) indicated that the rule was “other significant.”<sup>143</sup>
- The Department of Education indicated in four successive editions of the agenda (including the Spring 2014 edition, published one month before the rule was issued) that a forthcoming proposed rule would be “substantive, nonsignificant,” but the published NPRM indicated that proposed rule was “significant.”<sup>144</sup>

In two other rules, two editions of the Unified Agenda indicated that the rule would be “other significant,” but in the last edition of the agenda (published in one case one month before the rule was published, and in the other case only five days before the rule was published), the agency changed the priority to “economically significant” (the priority level that was indicated in the published rule).<sup>145</sup> Therefore, although the last edition of the agenda was correct, the public had little notice of the rules’ elevated priority. Adding these two rules to the previous total, 25 of the 83 rules (30%) had inaccurate agenda information regarding their priority at least until shortly before the rules were published.

### ***b. Independent Regulatory Agencies***

Of the seven significant proposed rules published in the first half of 2014 by the independent regulatory agencies that had a prior “proposed rule stage” agenda entry, none of them mentioned the priority of the rule in relation to Executive Order 12866. This is

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<sup>142</sup> U.S. Department of Labor, Wage and Hour Division, “Establishing a Minimum Wage for Contractors,” 79 FR 34568, June 17, 2014. The proposed rule implemented Executive Order 13658, issued February 12, 2014, which raised the hourly minimum wage paid by federal contractors to workers performing on covered federal contracts to: \$10.10 per hour, beginning January 1, 2015; and beginning January 1, 2016, and annually thereafter, an amount determined by the Secretary of Labor. The Executive Order directed the Secretary to issue regulations by October 1, 2014. DOL stated in the proposed rule that the rule was “economically significant” because “When this rule’s impact is fully manifested by the end of 2019, the total increase in hourly wages for Federal contract workers is expected to be \$501 million (in 2014 dollars) (\$100.20 million × 5 years).” In addition, DOL estimated another \$25.7 million in implementation costs.

<sup>143</sup> U.S. Department of the Interior, Bureau of Indian Affairs, “Federal Acknowledgment of American Indian Tribes,” 79 FR 30766, May 29, 2014.

<sup>144</sup> U.S. Department of Education, “Vocational Rehabilitation Services Projects for American Indians With Disabilities,” 79 FR 35502, June 23, 2014.

<sup>145</sup> U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, “Medicare Program; Prior Authorization Process for Certain Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Items,” 79 FR 30511, May 28, 2014; and Environmental Protection Agency, “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” 79 FR 34830, June 18, 2014.

not unexpected, as the executive order’s analytical and review requirements do not apply to independent regulatory agencies.

## 2. Final Rules

### a. Cabinet Departments and Independent Agencies

Of the 41 significant final rules published during the first half of 2014 by Cabinet departments and independent agencies that had a prior “final rule stage” agenda entry, two of the rules (both issued by SBA) did not mention the priority of the rule. Of the remaining 39 rules, the last agenda entries for five of the rules (13%) indicated that the priority level of the upcoming rules would be at one level, but the level indicated in the published rules was something else. Specifically, (1) in three of the rules, the last agenda entries indicated that the rules would be “substantive, nonsignificant,” but the final rules indicated that they were “other significant;” and (2) in two other rules, the last agenda entries indicated that the rules would be “other significant,” but the final rules indicated that they were “economically significant.” For example:

- USDA/FNS stated in the Fall 2011, 2012, and both 2013 editions of the agenda that an upcoming final rule would be “other significant,” but the March 2014 rule itself indicated that it was “economically significant.”<sup>146</sup>
- The Mine Safety and Health Administration (MSHA) within DOL stated in the Fall 2011, 2012, and both 2013 editions of the agenda that an upcoming final rule would be “other significant,” but the May 2014 rule itself stated that it was “economically significant.”<sup>147</sup>
- IRS said in the Spring and Fall 2013 and the Spring 2014 editions of the agenda that one of its upcoming rules would be “substantive, nonsignificant.” However, the rule itself (published only three weeks after the Spring 2014 agenda) stated that it was a “significant regulatory action.”<sup>148</sup>
- In its only “final rule stage” entry for one of its upcoming rules, OPM stated in the Fall 2013 edition of the agenda that the rule would be “substantive,

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<sup>146</sup> U.S. Department of Agriculture, Food and Nutrition Service, “Special Supplemental Nutrition Program for Women, Infants and Children (WIC): Revisions in the WIC Food Packages,” 79 FR 12274, March 4, 2014. In the discussion of the regulatory impact analysis for the rule, FNS stated that the rule involved annualized monetized transfers of \$225 million from FY2014 through 2018.

<sup>147</sup> U.S. Department of Labor, Mine Safety and Health Administration, “Lowering Miners’ Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors,” 79 FR 24814, May 1, 2014. The rule stated “MSHA has determined that the final rule may have an effect of \$100 million or more on the economy in at least one year, and is therefore an ‘economically significant’ regulatory action.”

<sup>148</sup> U.S. Department of the Treasury, Internal Revenue Service, “Regulations Governing Practice Before the Internal Revenue Service,” 79 FR 33685, June 12, 2014. In the rule, IRS said “This rule has been designated a ‘significant regulatory action’ although not economically significant, under section 3(f) of Executive Order 12866.”

nonsignificant.” However, the rule that was published less than four months later indicated that the rule was “other significant.”<sup>149</sup>

Sometimes, a single agenda entry can refer to more than one rule, and those rules can be of varying priority – making it hard for users of the agenda to understand what rule is being referenced. For example, in the Fall 2013 edition of the agenda, PBGC indicated that one of its rules would be “economically significant,” but in the Spring 2014 edition of the agenda, the agency indicated that the rule (published two months earlier in March 2014) had been only “substantive, nonsignificant.” In fact, however, PBGC had issued two rules under the same RIN – one that was “economically significant” in January 2014,<sup>150</sup> and another that was “substantive, nonsignificant” in March 2014.<sup>151</sup> (The elements of both rules had been in the previous proposed rule, but were split into two final rules because of positive comments on the economically significant portion of the rule, and because of a February 2014 deadline for that portion of the rule.)

#### ***b. Independent Regulatory Agencies***

None of the six significant final rules issued by the independent regulatory agencies during this period that had a prior “final rule stage” Unified Agenda mentioned the priority of the rule in relation to Executive Order 12866. This is not unexpected, as the executive order’s analytical or review requirements do not apply to independent regulatory agencies.

### **C. Identifying Regulatory Flexibility Analyses**

For each agenda entry, agencies are asked whether “an analysis is required by the Regulatory Flexibility Act because this rulemaking is likely to have a significant economic impact on a substantial number of small entities.” Agencies can answer “Yes,” “No,” or “Undetermined.” If the answer is “Yes,” agencies are instructed to identify the affected small entities (i.e., businesses, governmental jurisdictions, and/or non-profit organizations). In an optional question, agencies are asked “Is this rulemaking likely to have some impact on small entities?” If so, agencies are instructed to identify the small

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<sup>149</sup> Office of Personnel Management, “Pay for Senior-Level and Scientific or Professional Positions,” 79 FR 12353, March 5, 2014. Notably, in several previous “proposed rule stage” entries, OPM had said the rule was “other significant.”

<sup>150</sup> Pension Benefit Guaranty Corporation, “Payment of Premiums; Large-Plan Flat-Rate Premium,” 79 FR 347, January 3, 2014. PBGC said this rule was economically significant because it would “cause a one-time shift of about \$1.5 billion (attributable primarily to calendar year plans) from one fiscal year to the next. Although no premium revenue will be lost, there will be the appearance of a one-time loss for the year when the due dates change, and PBGC has therefore determined that this final rule is economically significant under the criteria in Executive Order 12866.”

<sup>151</sup> Pension Benefit Guaranty Corporation, “Premium Rates; Payment of Premiums; Reducing Regulatory Burden,” 79 FR 13547, March 11, 2014.

entities affected (i.e., businesses, governmental jurisdictions, and/or non-profit organizations).<sup>152</sup>

As discussed in greater detail in Appendix A of this report, Section 603 of the RFA requires agencies to prepare an “initial regulatory flexibility analysis” (IRFA) before publishing a proposed rule. When an agency issues a final rule for which a proposed rule is required, Section 604 of the act requires the agency to prepare a “final regulatory flexibility analyses” (FRFA). However, the agency is not required to prepare an IRFA or a FRFA if the rule published without a notice of proposed rulemaking, or if the agency certifies that the rule is not expected to have a “significant economic impact on a substantial number of small entities.”<sup>153</sup> Agencies are required to publish such certifications in the *Federal Register* at the time the proposed and final rules are published, along with a statement providing the factual basis for such certification.

## 1. Proposed Rules

### a. Cabinet Departments/Independent Agencies

Of the 83 proposed rules that were published with a prior “proposed rule stage” entry in the Unified Agenda, in 22 of those entries (27%), the agenda entry differed from how the rule itself characterized the agency’s actions relative to the Regulatory Flexibility Act. Most commonly (in 17 of the 22 rules), the agenda entry stated that it was “undetermined” whether a regulatory flexibility analysis was required for the rule, but the rule itself clearly indicated that an analysis was or was not required or conducted.<sup>154</sup> In at least seven of these cases, even the edition of the agenda *after* the rule was published said the RFA analysis was “undetermined.” For example:

- In five straight editions of the agenda (starting in Fall 2011 and through the Spring 2014 edition), the agenda entries for a forthcoming DOL/EBSA proposed rule indicated that it was “undetermined” whether a regulatory flexibility analysis was required. However, the NPRM itself (published two months before the Spring 2014 agenda was published) indicated that an analysis was conducted.<sup>155</sup>
- The Fall 2013 and Spring 2014 editions of the agenda indicated that it was “undetermined” whether an RFA analysis was required for a forthcoming CMS

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<sup>152</sup> Agencies are told they may wish to answer this optional question if the answer to the first question is “No” or “Undetermined,” but it appears an agency could answer the second question even if the answer to the first question is “Yes.”

<sup>153</sup> 5 U.S.C. § 605(b).

<sup>154</sup> In 11 cases, the agenda said it was “undetermined” whether an analysis was required, but the rule said the analysis was not required. In the other six cases, the agency said an analysis was required.

<sup>155</sup> U.S. Department of Labor, Employee Benefits Security Administration, “Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2)-Fee Disclosure,” 79 FR 13949, March 12, 2014.

proposed rule, but the NPRM itself (published three weeks before the Spring 2014 agenda) indicated that an analysis was not required.<sup>156</sup>

Arguably more troubling, for five other proposed rules, the Unified Agenda indicated that a regulatory flexibility analysis *was not* required, but the rules themselves indicated that an analysis *was* required or was done for the rules. (There were no instances of the opposite, in which the agenda indicated that an analysis was required, but the rule indicated that it was not.) Sometimes the last edition of the agenda containing this error was published *after* the rule itself was published. For example:

- Both 2013 editions of the agenda and the Spring 2014 edition indicated that a Department of the Interior/Fish and Wildlife Service proposed rule would not require an RFA analysis, but the rule itself (published nearly a month *before* the Spring 2014 edition) stated that an analysis was required.<sup>157</sup>
- The Fall 2013 and the Spring 2014 editions of the agenda indicated that a DOC/Patent and Trademark Office rule would not require an RFA analysis, but the rule itself (published nearly four months *before* the Spring 2014 edition) discussed the analysis that was conducted.<sup>158</sup>

#### ***b. Independent Regulatory Agencies***

Of the seven significant proposed rules issued by independent regulatory agencies during this period that had a prior “proposed rule stage” entry in the Unified Agenda, the agenda entries and the agencies’ final determinations were different in five of the rules. Specifically, the agencies said in multiple agendas that it was “undetermined” whether the rule would require a regulatory flexibility analysis (sometimes even in the agenda edition published after the rule was issued), but then ultimately concluded in the rule that an analysis was or was not required.<sup>159</sup> In three of these rules, the agencies ultimately determined that an RFA analysis was not required. In another rule, the agency concluded that an analysis was required.

In one rule jointly issued by FDIC, FRS, OCC, and FHFA, all of the agencies ultimately determined that an RFA analysis was not required, but their preceding agenda entries varied:

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<sup>156</sup> U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, “Medicare Program; Prospective Payment System and Consolidated Billing for Skilled Nursing Facilities for FY 2015,” 79 FR 25767, May 6, 2014.

<sup>157</sup> U.S. Department of the Interior, Fish and Wildlife Service, “Migratory Bird Hunting; Proposed 2014-15 Migratory Game Bird Hunting Regulations (Preliminary) With Requests for Indian Tribal Proposals and Requests for 2016 Spring and Summer Migratory Bird Subsistence Harvest Proposals in Alaska,” 79 FR 24511, April 30, 2014.

<sup>158</sup> U.S. Department of Commerce, Patent and Trademark Office, “Changes To Require Identification of Attributable Owner,” 79 FR 4105, January 24, 2014.

<sup>159</sup> The agencies often made this “undetermined” statement in multiple prior agenda entries. For example, in one SEC rule, the agency indicated in the Spring and Fall 2013 editions of the agenda, and in the Spring 2014 agenda (issued after the rule had been published) that the need for an RFA analysis was “undetermined,” even though the agency said in the rule itself that the analysis was not required. See 79 FR 25194.

- FDIC and OCC said it was “undetermined” in the Spring and Fall 2013 editions, and in the Spring 2014 edition (published after the rule had been published).
- FRS had no prior agenda entries for the rule.
- FHFA said an analysis was not required in the 2012 edition, and in the Spring and Fall 2013 editions.

## 2. Final Rules

### a. Cabinet Departments and Independent Agencies

Of the 41 significant final rules published during the first half of 2014 by Cabinet departments and independent agencies that had a prior “final rule stage” agenda entry, two rules (both issued by SBA) did not mention the RFA. Of the 39 remaining rules, the corresponding agenda entries did not correctly identify whether seven of the rules (18%) required a regulatory flexibility analysis. In five of the seven rules, the agenda entries indicated that an analysis was required, but the rules indicated that an analysis was not required. In the remaining two rules, the agendas indicated that it was “undetermined” whether an analysis was required, but the rules indicated that an analysis was not required.<sup>160</sup> For example:

- USDA/FNS stated in the 2012 and the Spring and Fall 2013 editions of the agenda (and in the Spring 2014 edition issued more than four months after the rule was published) that an RFA analysis *was required* for a rule, but the rule itself indicated that an analysis was *not required*.<sup>161</sup>
- FDA stated in the Spring and Fall 2011, 2012, and the Spring and Fall 2013 editions of the agenda (and in the Spring 2014 edition issued three months after the rule was published) that an RFA analysis *was required* for a rule, but the rule itself indicated that an analysis was *not required*.<sup>162</sup>
- In a rule jointly issued with IRS and HHS/CMS, DOL/EBSA stated in the Spring 2013 edition and in the Fall 2013 edition of the agenda (issued less than three months before the rule was published) that it was “undetermined” whether the

<sup>160</sup> According to the ROCIS Users Manual, “‘Undetermined’ is a permissible response if the action is at the prerule or proposed rule stage. By the final rule stage, the agency should have made a determination.” However, a search of the Spring 2014 agenda indicated that 80 agenda entries at the final rule stage indicated that it was “undetermined” whether an RFA analysis was required.

<sup>161</sup> U.S. Department of Agriculture, Food and Nutrition Service, “Certification of Compliance With Meal Requirements for the National School Lunch Program Under the Healthy, Hunger-Free Kids Act of 2010,” 79 FR 325, January 3, 2014. FNS said in the rule that it would not have a significant economic impact on a substantial number of small entities.

<sup>162</sup> U.S. Department of Health and Human Services, Food and Drug Administration, “Current Good Manufacturing Practices, Quality Control Procedures, Quality Factors, Notification Requirements, and Records and Reports, for Infant Formula,” 79 FR 7933, February 10, 2014. FDA said in the rule that it would not have a significant economic impact on a substantial number of small entities.

forthcoming rule required an RFA analysis. However, the February 2014 rule (and the post-issuance Spring 2014 agenda) indicated that an analysis was not required.<sup>163</sup>

In one rule issued by the Federal Aviation Administration within DOT, the agency went back and forth about whether an RFA analysis was required. The agency said an analysis *was* required in the Spring and Fall 2011 editions, but then said it *was not* required in the 2012 and Spring and Fall 2013 editions. Then, in both the February 2014 rule itself and the Spring 2014 edition of the agenda, the agency said an analysis *was* required.<sup>164</sup>

#### ***b. Independent Regulatory Agencies***

Of the seven significant final rules issued by independent regulatory agencies during this period that had a prior “final rule stage” entry in the Unified Agenda, one contained no mention of the RFA in the final rule. For four of the remaining six rules, multiple previous agenda entries consistently indicated that a regulatory flexibility analysis was or was not required, and the rule indicated the same. For one other rule, multiple previous “final rule stage” agenda entries indicated that an RFA analysis was required. When the rule was issued the agency discussed its “final regulatory flexibility analysis,” but ultimately indicated that the rule would not have a significant economic impact on a substantial number of small entities.<sup>165</sup>

In the last of the six rules, which was jointly issued by Treasury/OCC, FDIC, SEC and the Federal Reserve System, the agencies’ statements in the Unified Agenda regarding the RFA varied.

- OCC stated in the Spring and Fall 2013 editions that it was “undetermined” whether an RFA analysis would be required.
- FDIC consistently said in the 2012 and in both 2013 editions of the agenda that an analysis would not be required.
- SEC had no “final rule stage” entries for the rule, instead characterizing it as a “long-term action” in both 2013 editions, and a “completed action” in the Spring 2014 edition.
- The Federal Reserve System indicated in the 2012 and Spring 2013 editions of the agenda that it was “undetermined” whether an RFA analysis would be required, but said in the Fall 2013 edition that the analysis would not be required.

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<sup>163</sup> U.S. Department of Labor, Employee Benefit Security Administration, Internal Revenue Service, and U.S. Department of Health and Human Services, “Ninety-Day Waiting Period Limitation and Technical Amendments to Certain Health Coverage Requirements Under the Affordable Care Act,” 79 FR 10296, February 24, 2014. Notably, both IRS and CMS consistently said an RFA analysis was not required.

<sup>164</sup> U.S. Department of Transportation, Federal Aviation Administration, “Helicopter Air Ambulance, Commercial Helicopter, and Part 91 Helicopter Operations,” 77 FR 9932, February 21, 2014. FAA said it usually used a 2% threshold (ratio of annual compliance cost to annual revenue) to determine economic significance, but here used a 1% threshold.

<sup>165</sup> Securities and Exchange Commission, “Removal of Certain References to Credit Ratings Under the Securities Exchange Act of 1934,” 79 FR 1522, January 8, 2014.

Ultimately, when the rule was published on January 31, 2014, the four agencies agreed the rule would not have a significant economic impact on a substantial number of small entities, and that an RFA analysis was not needed.<sup>166</sup>

## D. Identifying Major Rules

The OIRA data call memorandum requires agencies to indicate that a rule may be “major” under the Congressional Review Act because it has resulted in or is likely to result in an annual effect on the economy of \$100 million or more or meets other criteria specified in the Act. The memorandum also states “the Administrator of the Office of Information and Regulatory Affairs will make the final determination as to whether a rule is major.” As noted previously, RISC instructions state that actions designated as “major” under the CRA should have a priority of “economically significant” or “other significant.”

### 1. Proposed Rules

#### *a. Cabinet Departments and Independent Agencies*

Of the 83 significant proposed rules published by Cabinet departments and independent agencies with a prior “proposed rule stage” Unified Agenda entry, only 29 mentioned the Congressional Review Act and whether or not the rule was expected to be a major rule. Of these 29 proposed rules, the final agenda entries for six of them (21%) either did not indicate whether the rules were major, or mischaracterized the rules in this regard.

- In three of the six proposed rules (all issued by CMS), the agency indicated in the agenda that it was “undetermined” whether the forthcoming rules would be major, but the NPRMs themselves ultimately indicated that they were major.<sup>167</sup>
- In one other CMS proposed rule, the last (Spring 2014) agenda entry for the rule indicated that the forthcoming rule was *not* major, but the NPRM itself (published five days after the agenda was published) indicated that it *was* major.<sup>168</sup>

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<sup>166</sup> Comptroller of the Currency, Federal Deposit Insurance Corporation, Securities and Exchange Commission, and the Federal Reserve System, “Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds,” 79 FR 5536, January 31, 2014.

<sup>167</sup> U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, “Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond,” 79 FR 15807, March 21, 2014; “Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2015,” 79 FR 26307, May 7, 2014; and “Medicare Program; FY 2015 Hospice Wage Index and Payment Rate Update; Hospice Quality Reporting Requirements and Process and Appeals for Part D Payment for Drugs for Beneficiaries Enrolled in Hospice,” 79 FR 26537, May 8, 2014.

<sup>168</sup> U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, “Medicare Program;

- In the only pre-issuance agenda entry for one other proposed rule, the HHS Office of Inspector General indicated that the rule’s “major” status was undetermined, but the NPRM itself clearly stated that it was not major.<sup>169</sup>
- In the last of the six rules, DOL/EBSA indicated in four straight editions of the agenda that a forthcoming proposed rule *would* be major, but the NPRM itself stated that it *was not* a major rule.<sup>170</sup>

***b. Independent Regulatory Agencies***

Only one of the seven significant proposed rules published by independent regulatory agencies that had a prior “proposed rule stage” entry in the Unified Agenda mentioned whether or not the rule would be a “major” rule under the Congressional Review Act. The agency concluded that the proposed rule was major, as had been predicted by the agency’s previous agenda entries for the rule.

**2. Final Rules**

***a. Cabinet Departments and Independent Agencies***

Of the 41 significant final rules published by Cabinet departments and independent agencies in the first half of 2014 with a prior “final rule stage” agenda entry, only 13 mentioned whether the rule was “major” under the CRA. Of these 13 rules, two of the rules indicated that they were not major, although previous editions of the agenda had indicated that they would be major rules.

- PBGC indicated in the only “final rule stage” edition of the agenda prior to the publication of a rule that it would be a major rule. The agency said the same thing in the “completed action” entry published in the Spring 2014 agenda. However, the rule itself indicated that it was not a major rule.<sup>171</sup>

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Prior Authorization Process for Certain Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) Items,” 79 FR 30511, May 28, 2014.

<sup>169</sup> U.S. Department of Health and Human Services, Office of Inspector General, “Medicare and State Health Care Programs: Fraud and Abuse; Revisions to the Office of Inspector General’s Exclusion Authorities,” 79 FR 26809, May 9, 2014.

<sup>170</sup> U.S. Department of Labor, Employee Benefits and Security Administration, “Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2)-Fee Disclosure,” 79 FR 13949, March 12, 2014.

<sup>171</sup> This rule was divided into two rules, both under the same RIN, and the first one was major.

- DOE/EE stated in the 2012 and in the Spring and Fall 2013 editions of the agenda that a forthcoming final rule would be a major rule. However, when the rule was published in February 2014, the agency said the rule was *not* major.<sup>172</sup>

Also, in two rules published in February and March 2014 for which there was no prior “final rule stage” agenda entry, DOE/EE stated in the text of the rules that they *were not* major rules. However, in “completed action” entries published in the Spring 2014 agenda a few months later, the agency indicated that the rules *were* major.<sup>173</sup>

#### ***b. Independent Regulatory Agencies***

Only one of the seven significant final rules published by independent regulatory agencies in the first half of 2014 that had a prior “final rule stage” agenda entry mentioned whether the rule would be “major” or not. In that rule, the agency indicated that the rule would be a major rule in multiple editions of the agenda, and the final rule indicated that it was major.

### **E. Summary**

This section of the report indicated that while the Unified Agenda often provides useful information on the timing and nature of agencies’ upcoming rules, that information is also sometimes wrong.

- The agencies’ final estimates of when significant rules would be issued were reasonably accurate, but in a number of cases that was only because they had frequently changed the estimated issuance dates over five or more editions of the agenda. In some cases, the agencies even misstated the issuance dates when the rules had already been published.
- In 28 (23%) of 122 significant proposed and final rules published in the first half of 2014, the issuing agencies’ last agenda entry indicated that the priority of the forthcoming rules would be at one level, but the published rule said they were at a different (almost always higher) level.

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<sup>172</sup> U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, “Energy Conservation Program: Energy Conservation Standards for External Power Supplies,” 79 FR 7846, February 10, 2014.

<sup>173</sup> U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, “Energy Conservation Program: Energy Conservation Standards for Metal Halide Lamp Fixtures,” 79 FR 7745, February 10, 2014; and “Energy Conservation Program: Energy Conservation Standards for Commercial Refrigeration Equipment,” 77 FR 17725, March 28, 2014. It is possible that the rules themselves were in error. In both the two rules and in their “completed action” agenda entries, the agency stated that the rules were “economically significant” under Executive Order 12866. While it is possible that a few rules could be “major” without being “economically significant,” it is unlikely that the opposite could be true.

- In 36 (27%) of 135 significant proposed and final rules, the agencies mischaracterized or did not disclose whether an analysis was required under the Regulatory Flexibility Act, in some cases even after the rules were published. However, it was not always clear whether the agencies were answering the agenda’s “analysis” question the same way.
- In 10 (23%) of 44 proposed and final rules in which the agencies mentioned the Congressional Review Act, the agencies’ agenda entries either mischaracterized or did not indicate whether the rules would be major under the act.

Overall, therefore, in about one-quarter of the rules examined, the agencies’ agenda descriptions of the rules in terms of priority, the RFA, and the CRA did not match the published rules, or did not provide information about the issue.

## **F. Why Agenda Entries Differ From Published Rules**

The senior agency employees interviewed for this report said the descriptive information about forthcoming rules in the Unified Agenda can differ from the published rules for a variety of reasons.

### **1. New Information After Agenda Deadline**

Several senior employees said that the information in the agenda is sometimes wrong because of the lengthy process needed to prepare the agenda, and the fact that new information becomes available after the agenda information deadline. Employees at one agency said their agency performs an initial analysis of upcoming rules when developing the agenda (e.g., whether an RFA analysis is required), but completes the full analysis in the course of writing the rule, and said the two analyses may differ. Employees at another agency said the agency’s estimated publication date or the agency’s understanding of a rule’s significance may have been accurate at the time that OIRA required the agenda information to be submitted to RISC, but the agenda is normally not published until about three months later. During that period, rules are published, analyses are completed, and other information becomes available that makes the original submission in error.

Another agency staff member said that her agency uses the best information available to characterize the rules in the agenda (e.g., whether it will be “major” or not), and will sometimes use the “undetermined” category until they have more information. She said her agency is locked out of the ROCIS system for a period before the agenda is published, so any updates due to new information have to be transmitted to RISC for entry into the system.

A senior employee from another agency said that it is only after the agency has completed a regulatory impact analysis that it becomes clear whether or not a rule will be “major” or “economically significant.” If the deadline for submission of agenda data comes and that analysis is not complete, he said his agency often just says it is “undetermined” whether a rule will be major. If the analysis is completed and the rule is issued before the next edition of the agenda is published, then there may be an inconsistency between the agenda and the rule.

## **2. OIRA Directed Changes**

Senior staff members in another agency said that at the time one edition of the agenda was prepared, they had decided that a forthcoming final rule was not a “significant” regulatory action under EO 12866. However, they said that OIRA concluded during its significance determination process that the rule was significant, and “they make the final call.” By the time the next agenda came out, they said the rule had already been published. In another rule from the same agency, an employee said that an initial determination was made in the agenda that the rule would not have a significant economic impact on small entities before the threshold analysis was conducted. However, when the rule later went to OIRA for review, OIRA asked the agency to prepare the analysis before the rule was published. The agency staff members indicated that these kinds of differences between what the agenda says and what is in the rule can occur when an agenda is published only every six months.

Another senior employee said OIRA concluded that one of his agency’s rules was economically significant (the agency had said “other significant” in the agenda entry), and the agency ultimately agreed. The rule was issued before the next edition of the agenda was published. The same employee also said that the priority of a rule can sometimes change during the rule development process (either within the agency or during the OIRA review process) because of changes in the nature of the rule itself (e.g., making it cost less or provide fewer estimated benefits than in its original form).

## **3. Mistakes**

Several senior agency employees said that when the agenda that is published weeks or even months after a rule is published, and the agenda information differs from the published rule, the problem is likely that the agency did not carefully go over the “galleys” provided to the agency shortly before the rule was published.<sup>174</sup>

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<sup>174</sup> As noted earlier in this report, agencies are provided “galley proofs” of their agenda entries a few weeks before the agenda is published to ensure that the information is still correct.

#### 4. Lack of Clarity in RFA Agenda Element

Some of the senior agency staff interviewed for this report indicated that it was unclear what the phrase “Regulatory Flexibility Analysis Required” means, or how they should respond to the question regarding a particular rule. Some of the senior employees indicated that they respond to the question in the affirmative if the agency prepared any type of analysis to determine whether the agency could certify the rule as not having a significant economic impact on a substantial number of small entities, even if the analysis concludes that the rule will not have such effects. Other agency staff were not sure how the question should be answered, and were not confident that the responses for all of their own agencies’ rules were consistent.

The introduction to the Unified Agenda defines the term “Regulatory Flexibility Required” as having the following meaning: “whether an analysis is required by the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) *because the rulemaking action is likely to have a significant economic impact on a substantial number of small entities as defined by the Act.*” (Emphasis added.) Therefore, under this interpretation, an agency should only answer the question in the affirmative if the agency concluded that the rule would, in fact, have a significant economic impact on a substantial number of small entities, and therefore did the analysis required by the act.

The Executive Director of RISC indicated that he recognized that some agencies may be checking “Yes” to the “Regulatory Flexibility Analysis Required” data element, even though the agency concluded that the forthcoming rule would not have a significant economic impact on a substantial number of small entities. Ultimately, he said it is the agencies’ call as to how these questions should be answered. Although the introduction of the agenda “suggests” how RISC would like certain terms to be interpreted, he said the agencies determine how their rules are characterized in the agenda.

## VIII. Making the Unified Agenda More “Real Time”

As noted earlier in this report, many of the proposed and final rules that were published without a prior Unified Agenda entry were issued shortly after one agenda was posted, or shortly before the subsequent agenda. Also, some of the differences between the agenda’s depiction of a rule and the published rule were attributed to the semiannual nature of the agenda. If the agenda information was updated and posted more frequently, or was constantly updated and became a more “real-time” reflection of agency rulemaking (a so-called “evergreen” agenda), it is likely that fewer rules would be published without some type of prior agenda notice, and that there would be fewer errors in the characterizations of upcoming rules.

Several of the senior agency employees interviewed for this report characterized the semi-annual nature of the agenda as a vestige of when the agenda was being published in hard copy, and said that because agencies are locked out of ROCIS for up to a month before the agenda is published, it is sometimes out of date by the time that it is published. However, RISC indicated that agencies are encouraged to update their data entries as needed, and can do so up to a week before publication by contacting their Agenda analyst. They further stated that this is a subject of agenda training materials, and that many of their agency contacts understand they are able to edit agenda entries fairly closely to publication.

## **A. Support for a More Real-Time Agenda**

The American Bar Association's Section of Administrative Law and Regulatory Practice has endorsed, and has lobbied for, for an evergreen Unified Agenda. In a paper prepared for a February 2013 council meeting, Josiah Heidt, Co-Chair of the Section's e-Rulemaking Committee, noted that the Section was

beginning conversations with OIRA about the possibility of a government-wide, evergreen online version of the Unified Agenda in which agencies would provide regulatory agenda updates more often and which would more aggressively use the online tools currently being implemented and used on other government regulatory sites such as Regulations.gov and Data.gov. This idea is still in its early stages, and there are undoubtedly several practical, legal, and political hurdles that would have to be addressed before any such platform could be built.<sup>175</sup>

The issues that Heidt discussed included:

- what the site should look/feel like (e.g., more visuals, learning tools, and agency subpages);
- the audience for such an “evergreen” agenda (e.g., regulated entities and advocacy groups, but also more frequent agency access to other agencies’ plans);
- the goals of such a site (both for the government as a whole and for individual agencies);
- the consequences of more frequent development of and broader access to agency regulatory plans;
- the types of feedback loops that would be helpful; and

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<sup>175</sup> Josiah Heidt, “Creating an Evergreen, Online Unified Agenda,” ABA Administrative Law February 2013 Council Meeting, available at [http://www.americanbar.org/content/dam/aba/administrative/administrative\\_law/feb\\_2\\_council\\_agenda\\_with\\_materials.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/administrative_law/feb_2_council_agenda_with_materials.authcheckdam.pdf).

- the changes that would have to take place at the agency level to implement a government-wide system.

Shortly after this memorandum was prepared, representatives of the Section met with OIRA in early 2013 to discuss the possibility of creating an “evergreen” or real-time agenda. Although OIRA representatives at the meeting were reportedly sympathetic to making the agenda more “real time,” they also reportedly expressed concerns about the additional time and effort required to prepare the agenda more frequently or on an ongoing basis, and the possibility of losing the twice-yearly agency focus on scheduling of rules that the semiannual publication requires.<sup>176</sup> According to the ABA representatives present at the meeting, there were no further communications or actions related to this initiative.

## **B. Related Legislation**

In the 113<sup>th</sup> Congress, legislation was introduced and acted upon that would, if enacted, require a more frequent reporting on agencies’ regulatory action than the semiannual reporting under the Unified Agenda. On February 27, 2014, the House of Representatives passed H.R. 2804, the “Achieving Less Excess in Regulation and Requiring Transparency Act of 2014 (ALERT Act), but the Senate did not act on the legislation. Among other things, the Act would have required the head of each agency to submit a monthly report to OIRA showing:

- Each rule that the agency expects to propose or finalize during the following year, along with such information as a summary of the nature of the rule and its RIN, the objectives and legal basis of the rule (including any statutory or judicial deadlines), whether the agency plans to analyze the rule’s costs and benefits, and the stage of rulemaking as of the date of submission.
- For each rule the agency expects to finalize and for which it has issued an NPRM, an approximate schedule for completing the rule, the estimated cost of the rule within specified ranges (e.g., less than \$50 million, \$50 million to \$100 million), and any estimate of the economic effects of the rule, including the effect on jobs.

OIRA would be required to post the above information on the Internet within 30 days after it is submitted, and a rule would generally not be permitted to take effect until the information has been available on the Internet for at least six months.<sup>177</sup>

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<sup>176</sup> Telephone conversations with Josiah Heidt, Cary Coglianese, and Jamie Conrad, Section representatives present at the meeting with OIRA.

<sup>177</sup> Exceptions to this requirement include rules for which the agency claims a “good cause” exception under 5 U.S.C 553(b)(B), and rules that the President declares in an executive order to be necessary because of an imminent threat to health or safety or other emergency, or for other stated reasons.

## C. Agency Rule Tracking and Information Systems

Because the Unified Agenda is posted no more than twice each year, some agencies have developed their own more “real-time” rule tracking and information systems that the public can use to obtain more current information about the status of at least some rules. As noted earlier in this report, agencies can use these tracking and information systems to exchange information with ROCIS when the Unified Agenda information is updated in response to OIRA data calls.<sup>178</sup> The following sections describe such systems

### 1. DOT Monthly Reports on Significant Rules

For example, DOT prepares a monthly report on the department’s “significant” rules.<sup>179</sup> Agencies within DOT periodically add to and update the information on their significant rules (after review and approval by the Office of the Secretary), and the department-wide report is usually posted on the website within the first week of each month. Each DOT monthly report entry contains a range of information about a particular rulemaking action, including:

- The name of the agency within DOT issuing the rule (e.g., the Federal Aviation Administration or the National Highway Traffic Safety Administration);
- The official title and the popular title of the rule;
- The RIN;
- The stage of the rulemaking (e.g., NPRM or final rule);
- The history of any previous stage(s) of the rulemaking;
- The action prompting the rulemaking (e.g., statute) and when the rulemaking process was initiated;
- An abstract containing a brief summary of the rule;
- A description of any statutory deadline for the rulemaking;
- A schedule with selected milestones beginning with submission to the Office of the Secretary for review; and
- An explanation for any delay.

Each rulemaking also has a color code – either green, yellow, red, or black.<sup>180</sup> A “green” designation means the rule is expected to meet the originally scheduled date for

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<sup>178</sup> The ROCIS Users Manual (p. 2) states that ROCIS “offers the capability to exchange data with agencies’ own tracking systems using browser-based file transfer and XML.”

<sup>179</sup> See <http://www.dot.gov/regulations/report-on-significant-rulemakings>. For non-significant rules, users are directed to the department’s most recent Unified Agenda submission.

<sup>180</sup> The color code designation is based on the date the rule was originally scheduled for publication or a legal deadline, whichever is earlier.

publication, while “yellow” means the rule is not likely to meet the schedule. “Red” means the rule is behind schedule, and “black” means DOT does not yet have a schedule for publication. If a schedule changes, the originally scheduled date will remain the same and the new dates will be provided under a “new projected date” column.

In addition to the monthly reports, DOT also publishes a monthly “effects report” showing the ongoing rulemaking efforts that are expected to have 21 different types of effects (e.g., those with “regulatory flexibility analysis” effects, federalism effects, information collection effects, economically significant effects, and so on). Within each effects category, regulatory actions are listed by DOT agency, and for each action, information is provided on the stage of rulemaking (e.g., NPRM or final rule), RIN, and DOT docket number.

## 2. EPA’s RegDaRRT System for Priority Rules

EPA also has a website that discloses information on its rulemaking activities. According to EPA, the Regulatory Development and Retrospective Review Tracker (Reg DaRRT):

provides information to the public on the status of EPA’s priority rulemakings and retrospective reviews of existing regulations. Reg DaRRT includes rulemakings that have not yet been proposed, those that are open for public comment, those for which EPA is working on a final rule, and those that have been recently finalized. In addition, Reg DaRRT includes retrospective reviews of rules that have already been finalized and are undergoing a review to determine if the rules should be modified, streamlined, expanded, or repealed.<sup>181</sup>

EPA managers determine which of the agency’s rules are of sufficient priority to merit inclusion on the website based on such factors as environmental significance, impact on the economy, and level of external interest.<sup>182</sup> In contrast to the Unified Agenda (which focuses on proposed or final rules expected to be issued within the next year), the Reg DaRRT system provides information on priority rules regardless of their expected publication dates. Users can search priority rules by their projected publication dates, phase of rulemaking (e.g., pre-proposal, NPRM, and final rule), topic (e.g., air, pesticides, water, toxic substances, or general), and/or or effects (e.g., children’s health, environmental justice, or small businesses). Users can also view the 25 most frequently viewed priority rules (excluding those that have been withdrawn or archived), those most newly added, and upcoming rulemakings by their projected publication dates. Each entry in the system shows the RIN, EPA docket number, rulemaking phase, abstract, and a timeline showing when the rulemaking was initiated as well as the actual or projected dates of when the draft rule was sent and received by OMB, when OMB review concluded, when the NPRM was published, and when the final rule was published. Potential effects of each priority rule are also available, as well as documentation of changes made during OMB review and citations to legal authorities. EPA said the

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<sup>181</sup> For more information, see <http://yosemite.epa.gov/opei/RuleGate.nsf/content/index.html?opendocument>.

<sup>182</sup> EPA said the rules considered a “priority” by the agency are pretty much the same as those considered “significant” under EO 12866, although there are some differences.

information in Reg DaRRT and the Unified Agenda are the same when information is submitted to RISC in response to OIRA data calls, but the agency's system deviates from the agenda over time as the agency system is updated.

Users can sign up to receive alerts regarding priority rulemakings (e.g., when new rulemakings are added to Reg DaRRT, when comment periods open, when final rules are published, and when public meetings will be held). The Reg DaRRT system is updated monthly, and users can access a page showing monthly "Action Initiation Lists" (AILs), which are snapshots of the rules that EPA initiates each month that have been approved for commencement by EPA's Regulatory Policy Officer and that will appear in the upcoming Unified Agenda. According to EPA, the AILs are:

used to notify the public about new rules and other regulatory actions. AILs are posted on the EPA website at roughly the end of each month. The AIL describes those actions that were approved for commencement during the given month. This process gives the public more up-to-date information about upcoming regulatory actions. In the past, the public had to wait for EPA's Semiannual Regulatory Agenda, which is updated only every six months.<sup>183</sup>

Each monthly AIL includes the title of the rule, its rulemaking stage, a contact person's information (name, phone number, and e-mail address), an abstract, and a general sense of the rule's projected publication date (e.g., "12 months or less").

### **3. FDA's Website**

As part of its Transparency Initiative and FDA Transparency Results Accountability Credibility Knowledge Sharing (TRACK),<sup>184</sup> FDA maintains a website that provides periodic updates on its upcoming rulemakings.<sup>185</sup> For each entry, the website provides the formal title of the rule, stage of rulemaking, an abstract summarizing the rule, any legal deadlines, the projected publication date, the FDA lead organization, and a "notes" column that identifies (among other things) whether the rule has been published or withdrawn, and when any comment period will end. Clicking on "published" in the notes brings up a copy of the publication. Users can sort the information by data field (e.g., FDA lead organization, or projected publication date), and can narrow the results by keyword (e.g., "tobacco") or projected publication date (e.g., within 30 days, within six months, or within one year). Users can also sign up for FDA TRACK email updates.

### **4. CMS Quarterly Provider Updates**

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<sup>183</sup> Ibid, p. 26. To view the AIL, see <http://www2.epa.gov/laws-regulations/actions-initiated-month>.

<sup>184</sup> See <http://www.fda.gov/AboutFDA/Transparency/track/ucm195010.htm> for more information on the FDA-TRACK initiative.

<sup>185</sup> To view the website, see <http://www.fda.gov/AboutFDA/Transparency/track/ucm351742.htm>.

CMS maintains a website providing users with “Quarterly Provider Updates” that the agency says are intended “to make it easier for providers, suppliers, and the general public to understand the changes we are proposing or making in the programs we administer (for example, Medicare, Medicaid, and the Children’s Health Insurance Program (CHIP)).”<sup>186</sup> CMS publishes the updates at the start of each calendar quarter (i.e., in early January, April, July, and October), and each update informs the public about (1) regulations and major policies currently under development during that quarter, (2) regulations and major policies completed or cancelled, and (3) new or revised manual instructions. CMS provides two versions of each update for both regulations and other types of issuances – (1) an Adobe Acrobat file, sorted by provider type (e.g., Ambulatory Surgical Centers, Community Mental Health Centers, and Home Health Agencies), and (2) a zipped Word file that permits users to unzip the file and sort the information. Each entry in the updates provides the CMS file code number, the subject matter of the regulation (essentially the title of the rule), the expected issue or publication date, and the provider type. Clicking on the file code number brings up the published rule.

Although some information is provided in the updates at the start of each quarter, the information is supplemented throughout the quarter as new rules are published. Users can receive changes to updates by subscribing to the CMS-QPU Listserv. However, unlike the Unified Agenda, these quarterly updates do not project possible issuance dates for unpublished rules.

## **B. Senior Agency Employees’ Views About a Real-Time Agenda**

Most of the senior agency employees interviewed for this report indicated that some type of more real-time Unified Agenda would be preferable to the current semiannual publication schedule. For example, one such employee said a real-time agenda “would be great,” and said her agency is asked about the schedule of their rules “all the time” by congressional staff and others. She said agency staff “know perfectly well that some of the dates in the agenda are not viable anymore” because it is not updated for months at a time. As a result, she said the current agenda does not always reflect the agency’s best thinking about what rules are going to be issued, and when. She said a more real-time agenda would not pose a major problem for her agency to implement as long as the requirements were reasonable.

Another senior employee described the current method of producing the agenda as “archaic” and “not helpful” in that the time required to compile the agenda inevitably results in at least some “stale data” by the time it is issued. Another employee said the agenda has become a real tool for managers in her agency, with some of the department’s political leadership using the agenda to manage their portfolio, and a real-time agenda could make that management process better. Senior staff in another agency said the amount of work required to prepare the current agenda is “tremendous,” and “consumes

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<sup>186</sup> See <http://www.cms.gov/Regulations-and-Guidance/Regulations-and-Policies/QuarterlyProviderUpdates/index.html?redirect=/QuarterlyProviderUpdates/>.

all levels” of the agency for short periods of time. Spacing that effort out, they said, could make the process flow more easily.

### **Concerns About a Real-Time System**

However, several other senior employees expressed concerns about moving to a real-time agenda. For example, one employee said that even though he believed a government-wide real-time system was technically doable, he was not sure that the benefits of such a system would be worth the additional time and costs because he believed that regulated entities and others more frequently go to the individual agencies for information about upcoming regulations, not the Unified Agenda. Similarly, another agency employee said she was not sure such a system would pass a “cost-benefit” test, since there are already other ways for the public to obtain information about the status of rules (e.g., the OIRA review pages on [Reginfo.gov](http://Reginfo.gov)). She also said that even though her agency already enters some information into ROCIS between data calls, it would take more time and effort to keep all of the agency’s entries constantly up to date. In addition, she said RISC/OIRA would have to come up with a process to make sure that everyone was doing updates the same way. Senior employees in other agencies made many of the same types of comments, expressing concern about the additional time and cost that would likely be required for more frequent updates to the agenda, and questioning whether the agenda provides information that is unavailable from other sources (particularly for those most affected by the agency’s rules).

Several of the senior staff said ROCIS is “ancient” and a “dinosaur” in terms of information systems, and said updating that system to allow the agenda be a real-time database would likely be very costly. They also said agencies would likely resist moving to a real-time agenda because it would be a lot of work, particularly since it is not clear who even uses the agenda to find out about rulemaking.

A senior employee in another agency said making the Unified Agenda a “real-time” database would raise questions of data quality. Before making information available to the public, she said agencies would likely be constantly asking the operating units whether any changes needed to be made before agreeing to show it to the public. The agency currently has only one person who inputs the data into ROCIS when the agenda is being prepared twice each year, so that job would likely become a more full-time position if the agenda was turned into a real-time database.

One senior agency staff member said that while a “real-time” agenda is technically possible (as some agencies have shown), he doubted whether OIRA in this or any other administration would be comfortable with such an arrangement government-wide since it would make it more difficult for OIRA (or others in the administration) to manage the information derived from agencies’ agendas. Other agency employees also mentioned this issue, saying a “real time” system would require OIRA to give up the ability to review agencies’ entries before publication, and that OIRA currently wants to see the

entries before they go “live.” As noted previously in this report, Executive Order 12866 assigns OIRA a leadership role in the development of the agenda.

### **Posting ROCIS Updates**

Several of the senior agency employees said that while moving to a real-time agenda may not be viewed as feasible or acceptable to some parties, there are steps that could be taken within the existing system to make the agenda more up to date and better reflect what rules will be issued and when. For example, senior employees in several of the agencies indicated that they already update their agenda entries within ROCIS between OIRA data calls, and said that simply posting that information to the current agenda when the updates are done (instead of waiting for the next agenda publication date) would make the agenda information more current.

Posting the updates could also encourage more agencies to prepare such interim updates their agenda entries. For example, employees in one agency said that their agency currently does not prepare such updates because there is no incentive to do so; the information is not visible to the public until the next edition of the agenda is published, so any interim updates would probably have to be updated again before publication. On the other hand, if updates to the Unified Agenda in between publication cycles were visible to the public, then agencies would have a reason to update their entries more frequently. Another senior employee said her agency has sometimes asked if the agenda information could be updated to reflect more current information, but said OIRA and RISC have only rarely permitted such updates.

### **Linking to the Rule Review Process**

Several of the senior staff members suggested tying agenda updates to other parts of the rulemaking process, with those updates provided either manually or automatically. For example, they said that whenever an agency submits a rule to OIRA for review under EO 12866 that had not previously appeared in the agenda, the agenda could be updated with information about the rule. Some suggested that since ROCIS is used in both systems, the information about the dates that OIRA began and completed review could be added to and automatically updated in the agenda. Also, linking together the systems could update the priority of the rules in the agenda (since only “significant” rules are reviewed by OIRA, and OIRA review sometimes leads to changes in priority levels) and their estimated issuance dates (based on the length of OIRA reviews). However, one employee said linking the OIRA review information to the agenda could put pressure on OIRA to reduce the length of their reviews, as this would show the effect on the entire rule publication process (e.g., causing agencies to miss their estimated dates of publication). An employee in one agency agreed that more could be done to integrate/link the information in the agenda electronically to other parts of ROCIS and the *Federal Register*, saying “There’s definitely an IT solution here.”

## More Frequent/Disaggregated Publications

Another senior agency employee suggested that the agenda be converted to a “rolling” agenda with individual agencies’ agendas coming out at different times. He said the biggest headache for both the agencies and RISC is putting everything together into one document twice a year, so doing it in smaller bites might make it easier to produce. Another employee suggested changing the publication schedule to every three months instead of every six months, since doing so would likely mean that fewer agenda entries would need to be changed.

One agency staff member said he believed that the relevant public goes to agencies, not the Unified Agenda, for information about upcoming rules. Therefore, he said a more cost-effective approach might be to move to a more decentralized agenda system in which users could go to the OIRA or Reginfo.gov website, and it would have a referral page that served as a “pointer” to more real-time departmental or agency systems. He said that OIRA could establish minimum standards for such systems, but let the agencies run them and be responsible for their accuracy and currency.

## IX. Conclusions and Recommendations

OIRA has said that a central goal of the Unified Agenda is to “promote transparency and open government,”<sup>187</sup> and has also said agencies

can help achieve the objectives of open government by making clear, meaningful, and informative updates to the Unified Agenda. By supplying accurate, timely content, you will increase the transparency and accessibility of the regulatory process, maximizing the value of these documents to the public, while also improving planning and coordination.<sup>188</sup>

This study indicates that the Unified Agenda can be an effective way to improve the transparency of the federal rulemaking process. For example, the agenda did a reasonably good job identifying upcoming significant proposed rules from Cabinet departments and independent agencies. About 94% of those rules that were published in the first six months of 2014 had a prior “proposed rule stage” agenda entry, and for 90% of the rules, that agenda entry was posted at least two months before the rule was published.

However, this study also indicates a number of areas in which the Unified Agenda’s contribution to rulemaking transparency can be improved. Arguably the most notable of those areas is the “pending” status category, in which agencies are permitted to keep

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<sup>187</sup> See, for example, OIRA’s March 28, 2013, data call in advance of the Spring 2013 update, available at <http://www.whitehouse.gov/sites/default/files/omb/inforeg/for-agencies/spring-2013-agenda-data-call.pdf>.

<sup>188</sup> Ibid.

RINs and titles of long-term regulatory actions alive while not disclosing them to the public. The “pending” category itself is somewhat of a secret. It is not mentioned in any publicly available document (e.g., OIRA data call memoranda, the introduction to the Unified Agenda, or even the ROCIS User Manual), and knowledge of its existence appears to be primarily confined to those involved in the preparation of the agenda. OIRA and RISC created the “pending” category in 2011 (shortly after criticisms about the number of entries in the agenda) to focus the agenda on items that were most likely to be issued as rules. Although the number of entries in the agenda has dropped substantially since 2012, the actual number of RINs may be unchanged if the “pending” entries are added to the total. (The number of “pending” entries is unclear because RISC did not provide a list or even a total, but just three agencies reported having about 200 entries in “pending.”) Also, the agenda does not appear to be any better able to predict the issuance of proposed and final rules than before the “pending” category was established. In essence, therefore, “pending” is an undisclosed category of long-term rulemaking actions that do not appear in the agenda.

Also, although the FCC publishes an average of about 250 proposed and final rules each year (more than any other independent regulatory agency), the agency does not use the Unified Agenda to identify its upcoming rules. Virtually all of the agency’s agenda entries are in the “long-term action” agenda category, which do not indicate when future rulemaking activity will occur. This approach is different than every other agency covered by the agenda requirements, and contrary to the basic purpose of the agenda.

This report also indicates that the information provided in the agenda has not always been accurate or timely, and the agenda has sometimes not been helpful in notifying the public about upcoming rules. For example:

- More than one-third of the significant final rules published by Cabinet departments and independent agencies during the first half of 2014 had no “final rule stage” entry in the preceding agenda giving the public at least two months notice of the upcoming rule.
- About two-thirds of the significant proposed and final rules published during this period by independent regulatory agencies had no prior proposed or final rule stage entries.
- Although “proposed rule stage” and “final rule stage” agenda entries are generally supposed to reflect rules that agencies expect to issue within the following 12 months, between 40% and 50% of the economically significant or major proposed and final rule stage entries in the Spring 2013 agenda were not published as proposed or final rules during the following 16 months. Examination of such entries in the Spring 2010 agenda produced about the same results.
- Even more troubling, some “proposed rule stage” and “final rule stage” entries have been repeatedly published in the agenda, sometimes for years. For example, one USDA entry on egg product inspection was in the “proposed rule stage” of the agenda for 26 editions in a row before the entry disappeared from the agenda. FDA published “final rule stage” entries for one of its rules in 18 consecutive editions of the agenda before the final rule was eventually published in February 2014. Many other agencies’ entries have been in the same agenda stage for five

or more editions of the agenda, with the expected publication date simply moved up a few months with each new edition of the agenda.

- Nearly one-quarter of the agenda entries for “significant” proposed and final rules that were published in the first six months of 2014 by Cabinet departments and independent agencies incorrectly identified the priority of the rules. In almost every case where this occurred at the proposed rule stage, the priority listed in the agenda was lower than the rules themselves indicated.
- The significant rules that were published in the first half of 2014 frequently did not mention whether or not they were “major” under the Congressional Review Act, but when they did, the preceding agenda entries for those rules were “undetermined” or wrong nearly 20% of the time.
- More than 25% of the entries for these significant proposed and final rules incorrectly characterized or did not reveal whether a Regulatory Flexibility Act analysis would be required. However, there appears to be some confusion among the agencies regarding what this data element means. Some of the agencies’ senior employees said they answered “Yes” to this question (indicating that an RFA analysis was required) if any type of analysis was performed, whereas other agencies said they answered “Yes” only if the rule was expected to have a significant economic impact on a substantial number of small entities.
- Some of the agenda entries indicated that proposed or final rules would be published within the next few months, even though the rules had already been published – sometimes months before the agenda was published.

These findings are for a select group of rules that were considered “significant” or “economically significant.” Senior agency employees interviewed for this report indicated that rules below those levels of priority may be even *more* likely to be published without a prior agenda entry, or to be inaccurately characterized in the agenda.

## **A. Making the Unified Agenda Information More Current**

The Unified Agenda is usually published about every six months. A number of the significant proposed and final rules that were published without a prior agenda notice appear to have been developed too late for listing in one edition of the agenda, and were published in the *Federal Register* before the next edition of the agenda was issued. Also, some of the apparent inaccuracies in the agenda may have been the result of the semiannual publication schedule, with information about a regulatory action’s timing, significance, or its effects on small entities not becoming available to the agency until late in the rulemaking process and after agenda information is required to be submitted to OIRA and RISC.<sup>189</sup>

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<sup>189</sup> The “too late/too early” problem is continuing, caused at times by short statutory deadlines for rulemaking. For example, on August 7, 2014, the President signed into law the “Veterans Access, Choice and Accountability Act of 2014” (Public Law 113-146), which required VA to furnish hospital care and medical services to eligible veterans through agreements with identified eligible entities or providers. Section 101(n) of the act required VA to publish an

Some have suggested that the Unified Agenda be published more frequently than twice each year (e.g., quarterly or monthly), or that the agenda be converted to a continuously updated, “real-time” database reflecting the rulemaking agencies’ current thinking about when rulemaking actions will occur and the effects of those rules. Doing so could, in the words of the OIRA data calls, “increase the transparency and accessibility of the regulatory process” and “maximiz[e] the value of these documents to the public, while also improving planning and coordination.” Some agencies already update their agenda information in ROCIS in between data calls (although that information is not made available to the public until the next edition of the agenda is published), and some agencies have websites enabling users to obtain more up-to-date rulemaking information than is currently available from the Unified Agenda. ROCIS already supports real-time databases in Reginfo.gov on regulatory actions and information collections under review at OIRA, both of which are updated every working day.

However, developing and maintaining a government-wide “real-time” agenda database could require substantial additional amounts of time and effort by OIRA, RISC, and many of the rulemaking agencies, and could be more costly to implement and maintain than the current semiannual publication schedule. Whether the additional effort and costs would be justified (i.e., whether the benefits of having a real-time agenda would be worth the additional cost) is unclear, particularly in the absence of generalizable information regarding how many individuals and organizations use the agenda to determine the status of agencies’ rulemaking actions, and how useful and unique that information is to those users.

Also, changing the Unified Agenda from a twice-yearly publication to a real-time database could reduce OIRA’s ability to review agencies’ planned regulatory actions and oversee the rulemaking process on behalf of the President.<sup>190</sup> In recent years, OIRA has had an average of about three months between the data call deadline and the date of publication to review agencies’ proposed agenda entries. Changing the agenda to a real-time database, or even to a monthly or a quarterly publication, could make it more difficult for OIRA to manage this process and suggest changes. On the other hand, even continuous updates could be subject to a one or two-week delay before posting to the agenda to enable OIRA desk officers to become aware of the new information and ask questions. Also, most of the agency staff members interviewed for this report indicated that OIRA only rarely suggests changes to the substance of their agenda entries.

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interim final rule on this issue within 90 days of the date of enactment (i.e., by November 7, 2014). VA published the required interim final rule on November 5, 2014 (79 FR 65571). However, because the statutory mandate was established after the Spring 2014 edition of the agenda was published in May 2014, and because the rule was required before the Fall 2014 edition of the agenda was published on November 21, 2014, the public had no advance warning through the agenda that the rule was about to be issued.

<sup>190</sup> Although OIRA has emphasized the goal of transparency in its recent data calls, the stated purpose of the agenda in EO 12866 is to “have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President’s priorities and the principles in the executive order.”

## Other Possible Steps

Even without turning the Unified Agenda into a “real-time” database for all agenda entries, a number of other steps could be taken to move the agenda in that direction, at least for the agencies’ most important rules. For example, under Executive Order 12866, Cabinet departments and independent agencies must submit their significant proposed and final rules to OIRA for review before they can be published. However, some of the draft rules submitted to OIRA have never appeared in the Unified Agenda, and other draft rules were last in the agenda at a stage inconsistent with their submitted status (e.g., draft proposed rules that were last in the agenda’s “long term action” category, or final rules that were last in the “proposed rule stage” category). RISC and OIRA currently require that an agenda entry be prepared for any draft rule that had not previously been in the agenda, but that information is not visible to the public until the following edition of the agenda is published. To make the agenda more current, OIRA and RISC could post that new information to the current edition of the agenda as soon as it is received (although doing so would require OIRA and/or RISC to either forgo review before the information is made public, or devote more resources to review). Similarly, OIRA and RISC could require that existing agenda entries be updated for any draft rule submitted to OIRA for review, and that updated information could be posted to the publicly available agenda.

Also, because ROCIS is used both to prepare the agenda and to reflect the status of rules under Executive Order 12866 review, information about the status of a rule in the agenda could be updated automatically through ROCIS when OIRA begins and completes its reviews, and/or when the rule is published in the *Federal Register*. Adding information to the agenda timeline on when rules were accepted for OIRA review and when the review is completed would permit the public to know whether an agency’s estimated issuance date is still feasible.<sup>191</sup>

OIRA and/or RISC could also provide links on the Unified Agenda website to departmental and agency systems that show the more current status of their significant or priority rules. OIRA and/or RISC could encourage other departments and agencies that issue a sufficiently large number of significant rules to develop their own information systems and websites to allow the public to obtain more up-to-date information about their rulemaking actions. OIRA and/or RISC could provide guidance to agencies wishing to have such systems and websites, based on the experience of other agencies. At some point, however, having each agency develop and maintain its own real-time agenda will become less efficient than developing and maintaining a single government-wide system. If a decision is ultimately made to make the Unified Agenda a “real-time” database of forthcoming rules, the development and maintenance of such a government-wide agenda could be guided by the experience of those departmental and agency-specific systems.

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<sup>191</sup> For example, a USDA/FSIS draft final rule on “Common or Usual Name for Raw Meat and Poultry Products Containing Added Solutions” (RIN 0583-AD43) was submitted to OIRA for review on April 30, 2014, and was still under review as of November 2014. Clicking on the highlighted RIN indicates that according to the Spring 2014 Unified Agenda, final action on the rule was expected in July 2014 – a date that was obviously not met because the draft rule was still under review at OIRA four months later.

*Recommendation: The OIRA administrator should determine whether a continuously updated “real-time” Unified Agenda is feasible, and whether the benefits of such a system would justify any additional costs.*

*Recommendation: If the OIRA administrator determines that a “real-time” Unified Agenda is not currently feasible or justified, federal departments and agencies should consider posting to their websites or elsewhere more up-to-date information on the status of their ongoing rulemaking actions than is available through the Unified Agenda. In developing such systems, departments and agencies should learn from the experience of other departments and agencies that have already developed such websites.*

*Recommendation: If the OIRA administrator determines that a “real-time” Unified Agenda is not currently feasible or justified, the administrator should consider taking other steps to ensure that the public has access to more up-to-date information on agencies’ ongoing and completed regulatory actions. Such steps could include: (1) providing links on the Unified Agenda website to departmental and agency websites and information systems that provide the public with more up-to-date information on rulemaking activities than is available through the agenda, (2) encouraging additional departments and agencies to develop their own such websites and systems, (3) using the experience of departments and agencies that currently have such websites and systems to provide guidance to other agencies regarding their development and operation, (4) allowing the public to see the updated information that some agencies already enter into the RISC/OIRA Consolidated Information System (ROCIS) in between OIRA data calls, (5) permitting the public to see updated agenda information that agencies prepare when significant rules are submitted to OIRA for review under Executive Order 12866, and (6) linking the Unified Agenda to the information in other parts of ROCIS so that agenda entries are automatically updated to reflect major rulemaking events (e.g., the start of OIRA review and the publication of agency rules).*

## **B. Disclosing “Pending” Regulatory Actions**

In an effort to make the Unified Agenda better reflect regulatory actions that are likely to occur, since at least 2010, OIRA has asked rulemaking agencies to consider terminating “long-term” and other agenda entries when no real activity is expected within the coming year. However, the agencies were reluctant to eliminate such entries from the agenda entirely because doing so would require them to obtain new RINs and titles should priorities change and those entries become active again. To accommodate those concerns, since at least late 2011, RISC and OIRA have permitted agencies to designate long-term and other actions as “pending,” meaning that although those rulemaking efforts have viable RINs and titles and may be reactivated at any time, they are not published in the Unified Agenda.

One effect of the creation of the “pending” category seems to be a reduction in the number of entries in the Unified Agenda, which creates the impression that the level of regulatory activity is being reduced. The four editions of the agenda published in 2013 and 2014 contained an average of almost 650 fewer entries than the average of the 13

previous editions. About half of the reductions appear to have come from the “long-term action” category. The Fall 2011 agenda contained almost 300 fewer “long-term actions” than the previous edition, and the average number of such entries in 2013 and 2014 is more than 300 below the average of the previous 13 editions of the agenda. (In fact, “pending” actions are coded as “long-term actions” in the ROCIS database, but are just not published in the agenda.)

Making the Unified Agenda reflect regulatory actions that the agencies actually expect to issue is a laudable goal. However, doing so by moving hundreds of entries that otherwise would have appeared in the agenda into an undisclosed “pending” category does not seem consistent with what OIRA has described as a central goal of the agenda – “to promote transparency and open government.” Senior employees in several agencies voiced concerns about the “pending” category, with at least one agency refusing to characterize any of its entries as “pending.” However, other senior employees did not express such concerns.

The “long-term action” agenda category is defined as items under development but for which the agency does not expect to have a regulatory action within the following 12 months. Therefore, it is not clear how “pending” items are substantively different than “long-term action” items, other than the fact that “pending” items do not appear in the published agenda. Examination of “pending” entries from one agency revealed that a number of regulatory actions are revived from “pending.” Given the speed with which rules can move through the rulemaking process, agencies could revive a rule from “pending” and publish a proposed or final rule before the next edition of the agenda is issued, with the public having no idea that a rule was about to be issued. Because the Unified Agenda is intended to be a tool for both regulatory planning and transparency, having an undisclosed category of rules just outside the agenda seems to run counter to those purposes.

Moving entries from “pending” back to the published agenda would improve the transparency of the rulemaking process. As part of this effort, items currently in the “pending” category that are not actually “under development” (what some agencies refer to as “old and cold” entries) should be removed from the agenda.<sup>192</sup> The remaining “pending” entries that agencies indicate are still under development could be put back in the “long-term action” category, or OIRA could create a new “pending” category in the published agenda reflecting regulatory actions that are even less likely to see rulemaking action than items in the “long-term” category. As a result, agencies could keep their RINs and titles active, while disclosing to the public all of the rules that are still under development.

*Recommendation: Federal agencies should not keep regulations that are still under development in a “pending” category that is not included in the published Unified Agenda. Current “pending” regulatory actions that the agencies wish to continue but that are not likely to see*

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<sup>192</sup> Removing such an entry from the agenda would lead to discontinuation of the RIN, which could make tracking the rulemaking effort over time difficult should the agency restart the rulemaking in the future. However, any future RIN could be linked to the previous RIN, making such tracking easier.

*action within the following 12 months should be moved into either the long-term action category or a new “pending” category, defined as entries that are even less likely to see rulemaking action than entries in the long-term action category.*

### **C. Requiring the FCC to Identify Upcoming Active Rules**

The FCC is the only federal agency that puts virtually all of its Unified Agenda entries in the “long-term action” category. Since 2006, the FCC has published only two active agenda entries (both “proposed rule stage” entries for NPRMs that had already been published). As a result, the public has no clear idea when the agency will take action on its rules. FCC rulemaking is somewhat different than other agencies, with multiple proposed and final rules sometimes published under a single RIN. Therefore, it is understandable that the agency may not always know exactly when certain rulemaking actions will take place. However, the FCC publishes an average of about 250 proposed and final rules each year, and the agency likely can predict that at least some of these rules will be published within the following 12 months.

The FCC is subject to the same agenda requirements in both the Regulatory Flexibility Act and Executive Order 12866 as any other covered agency. The executive order states that each agency is to “prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA.” The OIRA data calls require agencies to identify their upcoming proposed and final rules. Although the FCC is an independent regulatory agency, and OIRA may have less leverage to make such agencies comply with the agenda’s requirements than departments and agencies that are subject to regulatory review under EO 12866, none of the other independent regulatory agencies put almost all of their entries in the long-term action category.

Also unlike other agencies, the FCC does not publish RINs with its proposed and final rules in the *Federal Register*. Section 4(b) of Executive Order 12866 requires that each Unified Agenda entry contain a RIN, and an April 7, 2010, memorandum from the OIRA Administrator to the President’s Management Council stated that agencies should use RINs “on all relevant documents throughout the entire ‘lifecycle’ of a rulemaking,” thereby increasing transparency and promoting public participation in the rulemaking process.<sup>193</sup> Requiring the FCC to use RINs in both the agenda and the *Federal Register* would better enable the public to understand which FCC agenda entries have been published as rules.

*Recommendation: The FCC should use the Unified Agenda to identify its upcoming rulemaking actions by providing entries in the active agenda categories (prerule,*

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<sup>193</sup> See [http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/IncreasingOpenness\\_04072010.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/IncreasingOpenness_04072010.pdf). The President’s Management Council (PMC) advises the President and OMB on government reform initiatives, provides performance and management leadership throughout the Executive Branch, and oversees implementation of government-wide management policies and programs. The PMC comprises the Chief Operating Officers of major federal agencies, primarily Deputy Secretaries, Deputy Administrators, and agency heads from the GSA and the OPM. See <http://www.gsa.gov/portal/content/133811> for more information.

*proposed rule, and final rule stages), and should not simply put actions in the “long-term action” agenda category. Also, to improve rulemaking transparency, the FCC should use regulation identifier numbers (RINs) in its proposed and final rules when they are published in the Federal Register.*

## **D. Improving the Credibility of the Agenda**

The Unified Agenda indicates that entries in the agenda “are, in general, those that will have a regulatory action within the next 12 months,” although it also says that agencies “may choose to include activities that will have a longer timeframe than 12 months.” Virtually all of the economically significant “proposed rule stage” and “final rule stage” entries in the Spring 2013 agenda indicated that rules were expected to be published within the following 12 months. However, between 40% and 50% of those rules were not issued in the following 16 months, and many of these agenda entries had been in the same stage of the agenda for years. One USDA agenda entry appeared in the “proposed rule stage” for 26 editions before disappearing from the agenda. DOT/FMSCA has had one economically significant entry at the proposed rule stage for 14 editions in a row, and DHS/TSA has had two such entries for that long. FDA has had three such entries at the proposed rule stage for between nine and 12 editions in a row. DOJ had one entry at the final rule stage for 16 straight editions, and DHS/CBP has had final rule stage entries for 12 or 13 editions in a row. Many other entries have appeared in the agenda for five or more agendas in a row. When rules appear in the same stage of the agenda year after year with only the projected issuance dates changing, the public will understandably stop believing the information provided, thereby damaging the credibility of the agenda as a whole.

Although RISC and OIRA have encouraged agencies to move these types of regulatory actions to the “long-term action” category or to drop them from the agenda entirely,<sup>194</sup> those efforts have apparently not been fully successful. Some type of more aggressive action is needed to ensure that incorrect information about whether and when rules will be issued is not repeated year after year.

*Recommendation: To ensure that the public is not misled and the Unified Agenda maintains credibility as a source of information, if an entry has been listed at either the “proposed rule” or “final rule” stages for six or more editions of the agenda in a row (i.e., or three years or more), the issuing agency/agencies should either move the entry into the “long-term action” category (or any newly created “pending” category) or eliminate the entry from the agenda entirely. If agency decides not to move or remove the entry, it should explain why no action was taken in the following edition of the agenda.*

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<sup>194</sup> All recent data call memoranda have told agencies to “consider terminating the listing” of entries for which “no real activity is expected within the coming year.”

## E. Disclosing Discontinued Rulemaking Actions

Some entries that have been in the Unified Agenda for multiple editions were simply dropped from the next edition of the agenda without explanation (e.g., the USDA action that was at the proposed rule stage for 26 editions in a row until it disappeared after the Spring 2013 edition). When this happens, the public does not know whether the proposed or final rule could still be issued in the future, or whether the rulemaking action has been discontinued. However, other such agenda entries were put in the “completed action” stage, with the agency noting in the timetable section that the action had been “withdrawn” as of a particular date. Doing so allows the public to know that the rulemaking action is not going forward.

Even when agencies publish these “completed/withdrawn” entries, they only rarely provide an explanation for why the rulemaking action has been withdrawn. In fact, the abstracts for these completed/withdrawal entries are often unchanged from their earlier publication, with the text suggesting that a rule may still be forthcoming. As one of the senior agency employees interviewed for this report said, the agenda would be more useful and informative if there was a general requirement that all agencies clearly indicate when and why previously active rulemaking actions have been discontinued.

*Recommendation:* To ensure that the public understands that a rulemaking action is not forthcoming, OIRA should require that when an entry has previously appeared in the Unified Agenda but the issuing agency subsequently decides not to go forward with the rulemaking action, the agency must complete the rulemaking action with an entry in the “completed action” section of the agenda, and identify the action as “withdrawn.” Also, OIRA should require the agency to include a brief statement in the abstract indicating why the regulatory action is being withdrawn.

## F. Reducing Inconsistencies in Agenda Information

Some of the information in a Unified Agenda entry is logically related to other information in the agenda. For example, if a forthcoming proposed or final rule is identified as “major” under the Congressional Review Act, the rule should almost always also be identified as “economically significant” under Executive Order 12866 because the definitions of the two terms are virtually identical.<sup>195</sup> However, searches of the Spring 2014 Unified Agenda indicate that 32 entries were coded as major rules, but were not considered economically significant; another 35 entries were coded as economically significant, but were not considered major. There were also instances in which individual agenda entries were simultaneously identified as “major” under the CRA, and “substantive, nonsignificant” in terms of EO 12866.

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<sup>195</sup> As noted earlier in this report, some rules may be considered “major” that are not “economically significant” (e.g., rules that would have a significant adverse effect on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets). See p. 5 of OMB guidance on the Congressional Review Act, available at [http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda\\_2010/m99-13.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m99-13.pdf).

There were also several examples of inconsistencies in the agenda information when rules were jointly issued by several agencies. For example, one significant proposed rule that was jointly issued by five agencies in April 2014 had no “proposed rule stage” entry under two of the agencies’ RINs, but there were many such entries when searched for under the other three agencies’ RINs. For one final rule published in January 2014 by four agencies, three of the four published “final rule stage” entries in both 2013 editions of the agenda, but the fourth agency characterized the rule as a “long-term action” in those agendas. Also, in both 2013 editions of the agenda, two agencies indicated that the rule was not major and said the rule’s priority was “substantive, nonsignificant;” another agency said it was “undetermined” whether the rule was major, but said the priority was “significant.”

Inconsistencies between data elements that are obviously related, and inconsistencies between agencies when they jointly issue a single rule, diminish the validity of the Unified Agenda, and can raise questions regarding the other information that is provided. In its data calls, OIRA encourages agencies to ensure that their information is internally consistent. In addition to the manual checks that the agenda entries receive from RISC and OIRA, electronic checks should also be done to determine whether the information is reliable and consistent. Ultimately, however, the agenda entries are the agencies’ entries. Therefore, if the agencies refuse to resolve any inconsistencies by the time the agenda is published, OIRA should somehow note those inconsistencies in the agenda (e.g., putting the inconsistent entries in bold).

*Recommendation: As part of the review process, OIRA should establish electronic or other checks to ensure that the information provided in the Unified Agenda is both internally consistent within one agency’s entry, and consistent across agencies when multiple agencies jointly issue a rule. If an agenda entry is determined to be inconsistent, OIRA should contact the agency or agencies and require them to resolve the inconsistency before the agenda entry is published. If the inconsistency is unresolved by the time of publication, OIRA should note the inconsistency in the published agenda.*

## **G. Clarifying the Regulatory Flexibility Data Element**

The data form used to submit information to OIRA and RISC for the agenda defines the “Regulatory Flexibility Analysis Required” data element as whether an analysis is “required by the Regulatory Flexibility Act because this rulemaking is likely to have a significant economic impact on a substantial number of small entities as defined by the Act.” (Emphasis added.) If the answer is “Yes,” then agencies are asked to identify the types of small entities affected (i.e., businesses, governmental jurisdictions, and/or non-profit organizations). If the answer is “No” or “Undetermined,” agencies are told they may wish to complete a separate optional question asking “Is this rulemaking likely to have some impact on small entities?” If the answer is “Yes,” agencies are asked to

identify the types of small entities affected (i.e., businesses, governmental jurisdictions, and/or non-profit organizations).

Several of the senior agency employees who were interviewed for this report indicated that they were not sure how these questions should be answered. For example, some of these employees said they answered “Yes” to the “Regulatory Flexibility Analysis Required” question if there was any type of analysis done to determine whether the forthcoming rule would have a significant economic impact on a substantial number of small entities, even if the analysis indicated that the rule would *not* have those effects. However, other agency employees said they would answer the question the opposite way (i.e., “No” to the “Regulatory Flexibility Required” data element if the initial analysis indicated that a substantial number of small entities would not experience a significant economic effect). Sometimes, those differences of understanding were expressed among staff within a single agency during the interviews conducted for this report. The agency officials also indicated that the separate optional question was confusing, particularly if they had already answered the first question “Yes.”

Federal agencies often must perform some type of initial analysis in order to determine whether a forthcoming rule will have a “significant” economic impact on a “substantial” number of small entities, and to provide the “factual basis” required for any certification that those impacts will not occur. If an agency did such an initial analysis, it is understandable why they might answer “Yes” to a question entitled “Regulatory Flexibility Analysis Required.” Also, agencies are not required to prepare a final regulatory flexibility analysis if a final rule is published without a notice of proposed rulemaking. Therefore, an agency could logically answer the “Regulatory Flexibility Analysis Required” question “No,” even if an analysis was done, and the rule was expected to have a significant economic impact on a substantial number of small entities.

The wording of the “Regulatory Flexibility Analysis Required” question should be made consistent with its intent. For example, if the intent of the question is to determine whether a forthcoming rule will require an initial or final regulatory flexibility analysis pursuant to Sections 603 and 604 of the RFA (given the caveats related to notices of proposed rulemaking and certification), then the question should be posed that way. On the other hand, if the intent of the question is to determine whether the rule is expected to have a significant economic impact on a substantial number of small entities, the caveats in the RFA notwithstanding, then the question should be written that way.

*Recommendation: OIRA should change the wording of the Regulatory Flexibility Act element in the agenda to reflect its intent. For example, if the intent is to determine whether a forthcoming rule is expected to have a significant economic impact on a substantial number of small entities, then the RFA element should be worded “Is this rule expected to have a significant economic impact on a substantial number of small entities?” On the other hand, if the intent is to determine whether an RFA analysis is expected, then the wording should be “Is this rule expected to require an initial or final regulatory flexibility analysis?”*

# Appendix A. Statutory and Executive Order Agenda Requirements

For more than 35 years, federal agencies have been required to notify the public about certain upcoming regulatory actions. Those requirements have been established by statute and through executive orders, only some of which are still in effect. This appendix compares and contrasts those statutory and executive order requirements.

## A. Regulatory Flexibility Act

The Regulatory Flexibility Act requires covered federal agencies (Cabinet departments, independent agencies, and independent regulatory agencies) to assess the impact of their forthcoming regulations on “small entities,” which the Act defines as including small businesses, small governmental jurisdictions, and certain small not-for-profit organizations. Section 603 of the RFA requires agencies to prepare an “initial regulatory flexibility analysis” (IRFA) before publishing a proposed rule. When an agency issues a final rule for which a proposed rule is required, Section 604 of the act requires the agency to prepare a “final regulatory flexibility analyses” (FRFA). However, the agency is not required to prepare an IRFA or a FRFA if the rule published without a notice of proposed rulemaking (NPRM), or if the agency certifies that the rule is not expected to have a “significant economic impact on a substantial number of small entities.”<sup>196</sup> Agencies are required to publish such certifications in the *Federal Register* at the time the proposed and final rules are published, along with a statement providing the factual basis for such certification.

Section 602 of the RFA requires covered agencies to publish a “regulatory flexibility agenda” in the *Federal Register* each April and October.<sup>197</sup> Specifically, the regulatory flexibility agendas are required to contain:

- (1) a brief description of the subject area of any rule which the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities;
- (2) a summary of the nature of any such rule under consideration for each subject area listed in the agenda pursuant to paragraph (1), the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking, and
- (3) the name and telephone number of an agency official knowledgeable concerning the items listed in paragraph (1).<sup>198</sup>

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<sup>196</sup> 5 U.S.C. § 605(b).

<sup>197</sup> Starting with the Fall 2007 edition of the Unified Agenda, only the agenda information required by the RFA and the Regulatory Plan are printed in the *Federal Register*.

<sup>198</sup> 5 U.S.C. § 602(a).

The regulatory flexibility agendas must be transmitted to the Chief Counsel for Advocacy of the Small Business Administration (SBA) for comment, and agencies are required to “endeavor to provide notice of each regulatory flexibility agenda to small entities or their representatives through direct notification or publication of the agenda in publications likely to be obtained by such small entities and shall invite comments upon each subject area on the agenda.”<sup>199</sup>

As Section 602(1) of the RFA indicates, the only rules required to be in the regulatory flexibility agendas are those that the agencies conclude are “likely to have a significant economic impact on a substantial number of small entities.” Previous research has indicated that agencies frequently conclude that their rules will not have such effects. For example, in a 2000 report, GAO said that EPA had certified more than 95% of its final rules issued in the late 1990s, and characterized EPA as having a “high threshold” for analysis (albeit within the discretion permitted in the statute).<sup>200</sup> Also, in a 2012 report for ACUS, the author of this report determined that for 72 of the 100 major rules published in 2010, the agencies indicated that a regulatory flexibility analysis was not required, most frequently because the rules were not expected to have a “significant economic impact on a substantial number of small entities.”<sup>201</sup> Of the nearly 2,300 entries in the Spring 2014 agenda at the proposed and final rule stages, the agencies indicated that only 212 (about 9%) required an RFA analysis.<sup>202</sup> Therefore, it appears that the RFA’s requirement for an agenda applies to only a small portion of agency rules.

## **B. Executive Orders**

Although Executive Order 12866 currently requires agencies to prepare agendas of their upcoming regulatory actions, it is only the most recent executive order to do so. The following sections trace the history of such requirements.

### **1. Executive Order 12044**

Section 2 of Executive Order 12044,<sup>203</sup> issued by President Carter in March 1978, stated the following:

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<sup>199</sup> 5 U.S.C. § 602(c).

<sup>200</sup> U.S. General Accounting Office, *Regulatory Flexibility Act: Implementation in EPA Program Offices and Proposed Lead Rule*, GAO/GGD-00-193. September 20, 2000, p. 31.

<sup>201</sup> See, for example, Curtis W. Copeland, “Regulatory Analysis Requirements: A Review and Recommendations for Reform, March 13, 2012, available at <http://www.acus.gov/sites/default/files/documents/COR-Copeland-Report-CIRCULATED.pdf>.

<sup>202</sup> As discussed later in this report, even this may overstate the number of rules with a significant economic impact on a substantial number of small entities, as agencies sometimes indicate analyses were required even when they concluded there were no significant effects on small entities.

<sup>203</sup> Executive Order 12044, “Improving Government Regulations,” 43 *Federal Register* 12661, March 24, 1978. This order was repealed by Executive Order 12291 in 1981, but Section 5 of the new order continued to require the publication of semiannual regulatory agendas.

To give the public adequate notice, agencies shall publish at least semiannually an agenda of significant regulations under development or review. On the first Monday in October, each agency shall publish in the *Federal Register* a schedule showing the times during the coming fiscal year when the agency's semiannual agenda will be published. Supplements to the agenda may be published at other times during the year if necessary, but the semiannual agendas shall be as complete as possible. The head of each agency shall approve the agenda before it is published. At a minimum, each published agenda shall describe the regulations being considered by the agency, the need for and the legal basis for the action being taken, and the status of regulations previously listed on the agenda. Each item on the agenda shall also include the name and telephone number of a knowledgeable agency official and, if possible, state whether or not a regulatory analysis will be required.

The executive order went on to say that covered agencies (Cabinet departments and independent agencies like EPA, but not independent regulatory agencies like the Securities and Exchange Commission) should “give the public an early and meaningful opportunity to participate in the development of agency regulations. They shall consider a variety of ways to provide this opportunity, including (1) publishing an advance notice of proposed rulemaking; (2) holding open conferences or public hearings; (3) sending notices of proposed regulations to publications likely to be read by those affected; and (4) notifying interested parties directly.”<sup>204</sup>

In a 1979 report on the implementation of this executive order, OMB said that the semiannual agendas “provide the first systematic look at an agency's regulatory activities,” and “[a]rmed with this early warning, the public now has more time to prepare its views on upcoming regulations.”<sup>205</sup> However, the report also noted that some agencies had not published their agendas on schedule (making it difficult for the public to find them), and that some of the descriptions of the regulatory actions were not as helpful as others.

## 2. Executive Orders 12291 and 12498

Executive Order 12291, issued by President Reagan in February 1981, revoked Executive Order 12044, but retained and expanded the scope of the agenda requirement.<sup>206</sup> Section 5 of EO 12291 required covered agencies (again, Cabinet departments and independent agencies, but not independent regulatory agencies) to:

publish, in October and April of each year, an agenda of proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review pursuant to this Order. These agendas may be incorporated with the agendas published under 5 U.S.C. 602, and must contain at the minimum:

(1) A summary of the nature of each major rule being considered, the objectives and legal basis for the issuance of the rule, and an approximate schedule for completing action on any major rule for which the agency has issued a notice of proposed rulemaking;

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<sup>204</sup> Ibid.

<sup>205</sup> Office of Management and Budget, *Improving Government Regulations: A Progress Report*, Part 1 (September 1979), p.13.

<sup>206</sup> Executive Order 12291, “Federal Regulation,” 46 *Federal Register* 13193, February 19, 1981.

- (2) The name and telephone number of a knowledgeable agency official for each item on the agenda; and
- (3) A list of existing regulations to be reviewed under the terms of this Order, and a brief discussion of each such regulation.

EO 12291 also permitted the Director of OMB to require agencies to provide additional information in an agenda, and to require publication of the agenda “in any form.”<sup>207</sup>

The requirements in EO 12291 differed from those in EO 12044 in several respects. Perhaps most notably, the earlier executive order only covered “significant regulations” under development or review, whereas EO 12291 was much broader, covering all “proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review.”

Executive Order 12498, issued by President Reagan in January 1985, established a regulatory planning process in which the same agencies covered by EO 12291 were required to submit to OMB each year draft and final information on “all significant regulatory actions underway or planned.” Agencies were generally prohibited from taking action on any of these significant actions until OMB’s review was completed, and agencies were required to notify OMB of any regulatory actions outside of the plan. The executive order stated that this “regulatory program” was intended to complement the regulatory planning and review procedures established in EO 12291, but EO 12498 did not specifically mention the agenda requirements.

### **3. Executive Order 12866**

In September 1993, President Clinton issued Executive Order 12866 on “Regulatory Planning and Review,” which revoked EO 12291 and EO 12498.<sup>208</sup> EO 12866 is still in effect, and continued the general framework of presidential review of rulemaking that was established by EO 12291. Most of the executive order’s requirements apply only to Cabinet departments and independent agencies, but not independent regulatory agencies. However, some of the regulatory planning provisions in Section 4 of the executive order also apply to independent regulatory agencies. Section 4(b) of the executive order states:

Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

#### ***a. Regulatory Plan***

Section 4(c) of Executive Order 12866 requires these same agencies to prepare a “Regulatory Plan” consisting of “the most important significant regulatory actions that

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<sup>207</sup> *Ibid.*, Section 5(b).

<sup>208</sup> EO 12866 also revoked EO 12498 on regulatory planning.

the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter.” Each plan is required to contain at a minimum:

- (A) A statement of the agency’s regulatory objectives and priorities and how they relate to the President’s priorities;
- (B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;
- (C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;
- (D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;
- (E) The agency’s schedule for action, including a statement of any applicable statutory or judicial deadlines; and
- (F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

Agencies are required to forward their regulatory plans to OIRA by June 1st of each year, and OIRA is to circulate each plan to other affected agencies, the Vice President, and presidential advisors. Agency heads who believe that a planned regulatory action of another agency may conflict with its own policy or action taken or planned are required to “promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency, the Advisors, and the Vice President.” If the OIRA Administrator believes that a planned regulatory action of an agency may be inconsistent with the President’s priorities or the principles set forth in the executive order or may be in conflict with any policy or action taken or planned by another agency, the administrator is required to promptly notify, in writing, the affected agencies, the Vice President, and presidential advisors. The agencies are required to publish their Regulatory Plans annually in the October publication of the Unified Agenda.

#### **4. Other Executive Order Requirements**

In addition to helping agencies satisfy the requirements of Executive Order 12866, the Unified Agenda also helps agencies meet the requirements in other executive orders. For example:

- Executive Order 13132 entitled "Federalism," signed August 4, 1999, (64 FR 43255), requires agencies to have an “an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.”<sup>209</sup> As part of this effort, agencies include in their Unified Agenda submissions information on whether their regulatory actions may have an effect on the various levels of government, and whether those actions have federalism implications.

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<sup>209</sup> Section 6(a) of Executive Order 13132, “Federalism,” 64 FR 43255, August 4, 1999.

- Executive Order 13211 requires agencies to provide, to the extent possible, information regarding the adverse effects that agency actions may have on the supply, distribution, and use of energy.<sup>210</sup> As part of this effort, agencies may include in their Unified Agenda submissions information on whether they have prepared or plan to prepare a “statement of energy effects” for their regulatory actions.

### **C. Comparison of RFA and Primary Executive Order Requirements**

As the table below indicates, although the RFA and Executive Orders 12044, 12291, and 12866 all required some type of regulatory agenda, the RFA and the executive orders vary in terms of their coverage and specific requirements. For example:

- EO 12044 stated that the purpose of the agenda was to give the public notice of upcoming rules. The RFA and EO 12291 did not state a purpose. EO 12866 emphasized regulatory planning, consultation, and coordination in its statement of purpose for both the agenda and the plan.
- EO 12044 and EO 12291 did not cover independent regulatory agencies, whereas the RFA and the agenda and plan requirements in Section 4 of EO 12866 cover those agencies.
- EO 12044 covered only “significant regulations,” whereas EO 12291 and EO 12866 covered virtually all regulations. The RFA covers only a relatively small number of rules that are expected to have a significant economic impact on a substantial number of small entities.
- EO 12044 gave agencies some discretion to determine the timing of their agendas. The RFA and EO 12291 specified that the agendas were to be published in April and October of each year. EO 12866 gives the OIRA administrator the authority to determine when (and the manner by which) the agendas will be published.
- EO 12044 permitted supplementary agendas to be published, but the RFA, EO 12291, and EO 12866 contained no such provision.

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<sup>210</sup> Section 2(a) of Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355, May 22, 2001.

### Comparison of Agenda Requirements in the RFA and Executive Orders

	RFA	EO 12044	EO 12291	EO 12866	
				Unified Agenda	Regulatory Plan
<b>Purpose</b>	None specified	To give the public adequate notice	None specified	To have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles in the executive order	Same as agenda
<b>Timing of agendas</b>	In April and October of each year	At least semiannually  Agencies required to announce the schedule of publication on the first Monday in October.	In April and October of each year	At a time and in a manner specified by the Administrator of OIRA	Agencies send plans to OIRA in June  Plans are published in October edition of the agenda
<b>Agenda supplements</b>	None specified	Permitted at other times of the year	None specified	None specified	None specified
<b>Covered agencies</b>	Cabinet departments, independent agencies, and independent regulatory agencies	Cabinet departments and independent agencies, but not independent regulatory	Cabinet departments and independent agencies, but not independent regulatory agencies	Cabinet departments, independent agencies, and independent regulatory agencies	Cabinet departments, independent agencies, and independent regulatory agencies

		agencies			
<b>Covered rules</b>	Any rule the agency expects to propose or promulgate which is likely to have a significant economic impact on a substantial number of small entities	Significant regulations under development or review	Proposed regulations that the agency has issued or expects to issue, and currently effective rules that are under agency review pursuant to the executive order	All regulations under development or review	The most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter
<b>Approval process</b>	Transmitted to SBA Chief Counsel for Advocacy for comment  Agencies are to try and provide notice of agendas to small entities or their representatives	The head of each agency shall approve the agenda before it is published.	None specified	None specified	Approved by agency head  OIRA circulates plans to other agencies, Vice President, and advisors  OIRA notifies agencies and others in writing of concerns
<b>Minimum required contents of each agenda or action</b>	A brief description of the subject area; a summary of the nature of any such rule for each area; the objectives and legal basis for the issuance of the rule; an approximate schedule for completing action on any rule for which the agency has issued a general notice of proposed rulemaking.	A description of the regulations being considered by the agency; the need for and the legal basis for the action being taken; the status of regulations previously listed on the agenda; the name and telephone number of a knowledgeable agency official; if possible, whether or not a regulatory analysis will be required	A summary of the nature of each major rule being considered; the objectives and legal basis for the issuance of the rule; an approximate schedule for completing action on any major rule for which the agency has issued a notice of proposed rulemaking; the name and telephone number of a knowledgeable agency official for each item on the agenda; a list of existing regulations to be reviewed under the terms of this Order, and a	A regulation identifier number; a brief summary of the action; the legal authority for the action; any legal deadline for the action; the name and telephone number of a knowledgeable agency official.	Statement of regulatory objectives and priorities and relation to the President's priorities; summary of each planned action (possibly with alternatives and estimates of costs and benefits); legal basis for each action; statement of the need for each action; schedule for action, including any statutory or judicial deadlines; and the name, address, and telephone number of a contact person.

			brief discussion of each such regulation.		
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Source: Text of the RFA and the executive orders.

## **Appendix B: Completed Actions Published in the Agenda for the First Time**

In the Fall 2014 Unified Agenda, 113 “completed action” entries were published in the agenda for the first time, which suggests that final rules may have been issued without having previously appeared in the agenda. However, closer examination of these entries reveals that some of these actions were “completed” without a final rule being issued. For example:

- Ten RINs from the Department of the Treasury’s Bureau of the Fiscal Service (FMS and BPD) (RINs 1530-AB27 to AB35 and AA02 to AA03) were completed when the RINs were transferred to other Bureau RINs (1530-AA00 to AA09).
- DOC merged RIN 0605-AA32 with 0605-AA33.
- HHS merged RIN 0991-AB97 with 0938-AR71.

### **A. Possible Reasons for No Prior Agenda Entry**

Of the entries that were completed by the issuance of a final rule, the rules themselves suggest a variety of reasons why related entries had not appeared in previous editions of the Unified Agenda. Many of them were classified as or appeared to be “administrative” or “informational” in terms of their priority. Most of these rules were not controversial, and were issued relatively quickly without a prior proposed rule under the “good cause” exception to notice and comment. For example:

- A DOC/Patent and Trademark Office rule (RIN 0651-AC98) simply renamed “Express Mail” to “Priority Mail” in its rules of practice because the U.S. Postal Service changed the name of the service in 2013.
- A DOI/Fish and Wildlife Service (FWS) rule (RIN 1018-BA52) updated the addresses of the Service’s headquarters offices.
- A National Archives and Records Administration rule (RIN 3095-AB82) changed the location of NARA facilities and hours of use.
- A DOT rule (RIN 2105-AE34) involved the organization and delegation of powers and duties in the Transportation Acquisition Regulation, and was described as “purely organizational” in nature.

- A DOI/FWS rule (1018-BA56) made technical corrections to the logo for wildlife and sport fish restoration programs.
- A DOT/NHTSA rule (2127-AL53) corrected a typographical error in a 2013 rule in response to a petition for reconsideration.
- A DOT/FMCSA rule (2126-AB76) incorporated by reference “out of service” criteria, and did not establish any new requirements.
- A HUD rule (2501-AD70) changed the name of an office (from “Office of Healthy Homes and Lead Hazard Control” to “Lead Hazard Control and Healthy Homes”).

Several other final rules published without a prior NPRM were also considered uncontroversial because they were deregulatory in nature. For example:

- Two HUD rules (2501-AD68 and 2502-AJ24) removed program regulations because the statutory authority for the programs expired.
- Another HUD rule (2506-AC36) removed regulations deemed obsolete as a result of a retrospective review under Executive Order 13563.
- A Farm Credit Administration rule (3052-AD00) removed all requirements for non-binding advisory votes at Farm Credit System banks and associations.

Several “substantive” final rules were issued quickly without an NPRM because they involved military or foreign affairs functions. For example:

- Six DOC/Bureau of Industry and Security rules (0694-AG12, AG14, AG16, AG22, AG25, and AG28) added certain persons to the “entity list” because they had been “determined by the U.S. Government to be acting contrary to the national security or foreign policy interests of the United States.” The rules were issued between April and August 2014 in response to events in Crimea and Ukraine.
- An August 2014 State Department rule (1400-AG62) amended International Traffic in Arms Regulations “to update the defense trade policy regarding the Central African Republic to reflect the most recent resolution adopted by the United Nations Security Council.” The UN resolution had been adopted in mid-April 2014.

Other substantive or significant rules appeared to have been issued without previously appearing in the agenda because of exigent circumstances and/or the need to have the rule go into effect quickly. For example:

- DOT/FAA published a final rule (RIN 2120-AK50) without a prior proposed rule under the “good cause” exception on April 25, 2014, prohibiting certain flights in the Simferopol (UKFV) flight region because of ongoing conflicts in the Ukraine and Crimea. (FAA issued the rule less than one month after the Russian Federation and Ukraine established conflicting requirements in the area. Less than three months after the final rule was published, Malaysia Airlines Flight 17 was believed to have been shot down in that area.)
- DOC/NOAA published an “emergency action” on May 15, 2014 (0648-BE18), setting red snapper accountability measures for the recreational sector of the Gulf of Mexico reef fish fishery in the wake of a decision by the U.S. District Court of the District of Columbia in *Guindon v. Pritzker*, 2014 WL 1274076 (D.D.C. March 26, 2014).
- DOC/NOAA also published a temporary “emergency action” on June 27, 2014 (RIN 0648-BE19) that the agency said was necessary to comply with an April 4, 2014, ruling by the U.S. District Court for the District of Columbia that invalidated and vacated the fishing year 2013 carryover measures.
- USDA published an economically significant final rule on disaster assistance programs on May 7, 2014 (0560-AI21), without a prior NPRM because the agency was required to publish the rule within 90 days after the Agricultural Act of 2014 was enacted (Public Law 113-79, February 7, 2014).

In most if not all of the above examples, the final rules were published too late for listing in the Spring 2014 edition of the agenda.

## **B. Unclear Why Other Rules Were Not Previously In Agenda**

On the other hand, it was not clear why other “completed actions” were first appearing in the Fall 2014 edition of the Unified Agenda. Several of these rulemaking actions had been in development for more than a year, or otherwise seemed as if they could have been listed in any earlier edition of the agenda. For example:

- USDA published a substantive proposed rule in June 2013 and a final rule in April 2014 on “Consolidation of Permit Procedures; Denial and Revocation of Permits” (0579-AD76). Also, USDA published several non-substantive rules (e.g., 0579-AD72, AD78, AD79) in which proposed rules were published in 2013 and final rules were published in the first half of 2014. Given that these rules were likely in development for more than a year before the Fall 2014 agenda was published, it is not clear why an earlier agenda listing was not possible.

- DOI/Bureau of Land Management published a final rule in June 2014 (1004-AE35) making inflation adjustments to required fees for mining claims or sites. BLM is required to make the adjustments every five years, so it is not clear why an earlier agenda entry could not have been published.
- DOT/FAA published a final rule in June 2014 (2120-AK46) extending by two years the requirement for helicopters to use the New York North Shore Helicopter Route. The agency had known for two years that the requirement was due to expire in August 2014.
- The Federal Energy Regulatory Commission (FERC) published a final rule in March 2014 (1902-AE83, "Annual Updating of Filing Fees"). FERC publishes this update every year.
- FDIC (along with the Comptroller of the Currency and the Federal Reserve System) published a proposed rule in May 2014 and a final rule in July 2014 on "Regulatory Capital Rules" (3064-AE13). The rule was issued as a result of comments received shortly after the agencies issued a related rule in 2013.
- A November 2014 State Department rule (1400-AD73) amended the International Traffic in Arms Regulations to "reflect a change in its policy on exports to Vietnam." Although the rule was issued without an NPRM under the APA's foreign affairs exemption, the policy change appeared to have been in development for some time. (The previous policy had been in effect since the end of the Vietnam War in the 1970's.)